UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION,	Civil Action No. 1:18-cv-06658 (JSR)
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY, Cross-Claim and Third-Party Plaintiffs, v. PLATINUM MANAGEMENT (NY) LLC, et al., Cross-Claim and Third-Party Defendants.	Civil Action No. 1:18-cv-12018 (JSR)

MEMORANDUM OF LAW IN OPPOSITION TO THIRD-PARTY DEFENDANT LINCOLN INTERNATIONAL LLC'S MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF DEFENDANTS BANKERS CONSECO LIFE INSURANCE COMPANY AND WASHINGTON NATIONAL INSURANCE COMPANY

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PRELIMINARY STATEMENT

Over the course of nearly 100 paragraphs, the Third Party Complaint ("Complaint") (Dkt No. 75) details how, based on Lincoln's own documents, we know that Lincoln actively participated in and furthered the Platinum/Beechwood fraud.[1] Those contemporaneous, Lincoln-authored documents also give us the "why:" [redacted] ¶¶ 692–706. To Lincoln—a new entrant to the portfolio valuation space looking to catapult itself into the big leagues—Platinum had just handed it the golden ticket.

So beginning in late February 2014 and continuing throughout the entirety of its engagement, Lincoln did Platinum's bidding. [redacted] ¶¶ 709–51. The Complaint details how [redacted]

[1] Citations to the docket refer to *Cyganowski v. Beechwood Re Ltd*, 18-cv-12018-JSR. Citations to paragraph numbers refer to the Complaint. Citations to "Br." refer to Lincoln's brief in support of its motion to dismiss (Dkt No. 182).

[redacted], and did, create the false impression in Washington National Insurance Company ("WNIC") and Bankers Conseco Life Insurance Company ("BCLIC") (collectively, "CNO") that the Trust assets—[redacted] were being prudently invested and had fair market values they did not have. ¶¶ 698, 728, 781. It details how CNO justifiably relied on each of those report's misrepresentations in not terminating the Reinsurance Agreements, [redacted] ¶¶ 752–59, 781–83. And, it details how those fraudulent valuations enabled Beechwood every quarter to withdraw millions in "surplus" funds while avoiding its obligations to top-up the Trusts, and to continue serving as a [redacted] for Platinum, harming CNO by leaving the value of the Trust assets below the contractual threshold, requiring it to post additional reserves it otherwise would not have had to post when it recaptured the Trust assets. ¶¶ 782, 699; *see also* ¶¶ 598, 600–02.

Lincoln ignores this whole cloth, instead asking the Court to dismiss the claims against it on the basis of "sheer implausibility," for three main reasons. *First*, Lincoln argues that its valuation reports contained everything CNO needed to see that the Beechwood-Platinum investments were not what Lincoln expressly represented them to be: arm's-length transactions between an unrelated buyer and seller. But the fact Lincoln's reports "identified Platinum as the owner of certain Beechwood investments," Br., at 2, is only revelatory if Lincoln *also* disclosed that Platinum and Beechwood were related entities, which it decidedly did *not* do. Perhaps more importantly, [redacted] That is textbook misrepresentation.

Lincoln also represented in its reports that it received and reviewed myriad financial information in analyzing and determining the fair values of each investment, but [redacted] CNO could not know that Lincoln [redacted] Nor was there any way for it to "check" Lincoln's work, given that much of the information upon which Lincoln's valuations were purportedly based was *non-public* information concerning non-public investments provided to Lincoln by Beechwood. The knowledge of and ability to reveal the Platinum/Beechwood fraud were uniquely Lincoln's. Rather than disclose it, Lincoln chose to affirmatively conceal it.

Second, Lincoln argues that CNO could not have relied on the information in its reports because they contained boilerplate disclaimers against third-party reliance and disclosed its lack of independent verification. But a disclaimer against third-party reliance is meaningless when Lincoln had actual knowledge that CNO (a third party) was in fact relying on Lincoln's reports in real time. So is purportedly "disclos[ing] that Lincoln relied on information provided by Beechwood without verification," Br., at 2, when Lincoln [redacted] A sophisticated valuation firm like Lincoln should know you cannot use a generalized disclaimer to disclaim actual and specific fraud, *especially* [redacted]

Finally, Lincoln argues that the claims against it are implausible because it had no motive to commit fraud—specifically, that Lincoln couldn't have been motivated by the prospect of a future payday from Platinum because it terminated the Beechwood engagement before that

payday arrived. But Lincoln's circular reasoning is belied by its own documents [redacted] That Lincoln decided to jump ship before that payday fully materialized only shows how bad the fraud was. [redacted]

STATEMENT OF FACTS

The facts set forth in the Complaint are incorporated in their entirety herein. The facts relevant to each claim against Lincoln are discussed in turn below.

ARGUMENT[2]

I. THE COMPLAINT CLEARLY STATES FRAUDULENT AND NEGLIGENT MISREPRESENTATION CLAIMS

A. The Complaint Specifically Details Lincoln's Intentional and Negligent Misrepresentations and Omissions

Lincoln summarily claims that "not a single drop" of the Complaint "identifies the actual fraudulent statements—or omissions—made in any valuation or that they were made with intent

[2] For purposes of efficiency, the RICO claims, which are common to all Defendants, are addressed in CNO's Omnibus Brief filed contemporaneously herewith. The arguments herein relate to those that are specific to Lincoln because Lincoln is different than the other Defendants in that it is a valuation company and not a Platinum/Beechwood insider.

to deceive." Br., at 17. That is absurd. The Complaint first [redacted] ¶ 707; *see* ¶¶ 693–706. The Complaint then lays out—in painstaking detail, [redacted] *See* ¶¶ 709–51.

For example, the Complaint alleges that [redacted] ¶¶ 718, 725, 727–28, [redacted] *See* ¶¶ 711–17, 720, 722–26, 727–29.

Lincoln characterizes these fraudulent misrepresentations as mere "critique[s] of Lincoln's methodology" alleging nothing more than insufficient due diligence. Br., at 20. But Lincoln's Positive Assurance Valuations explicitly represented that Lincoln *had in fact reviewed* myriad financial information in determining that each investment's fair value was reasonable. *See* Flath Decl., Ex. C at 2.[3] As alleged in the Complaint, [redacted] *See, e.g.*, ¶¶ 712–714, 723–25, 729. Representing that you did something you did not do is not "insufficient due diligence;" it is an affirmative misrepresentation.

Similarly, the Complaint [redacted] ¶¶ 733–34; *see* ¶ 718, [redacted] ¶ 716, [redacted] *See* ¶¶ 718, 732–34; *see also* ¶¶ 693–700, 704–06.

Lincoln tries to characterize this tranche of fraudulent misrepresentations—based on Lincoln's [redacted]—as mere negligence. *See* Br., at 14. But Lincoln's Positive Assurance Valuations *explicitly represented* that Lincoln had determined the reasonableness of Beechwood's fair values in accordance with "the fair value measurement principles of Financial

[3] Lincoln itself acknowledges that "the Engagement Letter and valuation reports [including their specific provisions] are integral to the Complaint and properly considered upon a motion to dismiss." Br., at 5, n.3 (citation omitted).

Accounting Standards Board Codification, Topic 820 – Fair Value Measurements and Disclosures, formerly Financial Accounting Standards No. 157" ("ASC-820"), including specifically ASC-820's "definition of 'Fair Value.'" Flath Decl., Ex. C at 3–4; *see* ¶ 716.[4] That definition explicitly ***excludes*** related-party transactions.[5] It was thus fraudulent for Lincoln to [redacted] ¶¶ 718, 732; *see also* ASC-850-10-50-5 ("Transactions involving related parties cannot be presumed to be carried out on an arm's-length basis, as the requisite conditions of competitive, free-market dealings may not exist. ***Representations about transactions with related parties, if made, shall not imply that the related party transactions were consummated on terms equivalent to those that prevail in arm's-length transactions unless such representations can be substantiated.***") (emphasis added).

What is more, the Complaint specifically alleges [redacted] *see* ¶¶ 745, 748–49, 751, [redacted]

[4] Lincoln made the same representation in its engagement letter with BAM, which was incorporated by reference in each of its Positive Assurance Valuations and Negative Assurance Letters. *See* Flath Decl., Ex. C, Disclaimer and Confidentiality Statement.

[5] ASC-820-20 defines "Fair Value" as "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date." "[M]arket participants" are defined as "buyers and sellers . . . [that] are independent of each other, that is, ***they are not related parties***." Master Glossary of FASB Codification, FAS 157-10-24(a) (emphasis added). "Related parties" are defined to include, among other things, "affiliates of the entity," "principal owners of the entity and members of their immediate families," and "other parties that can significantly influence the management or operating policies of the transacting parties or that have an ownership interest in one of the transacting parties and can significantly influence the other to an extent that one or more of the transacting parties might be prevented from fully pursuing its own separate interests." *Id.* at FAS 057-24-59.2.1.

[redacted] ¶ 716, [redacted] [redacted] ¶¶ 743–50 [redacted] *See* ¶¶ 750–51. [redacted] ¶¶ 739, 741. That is the antithesis of an "independent" "positive assurance" valuation—and it is a fraudulent misrepresentation.

B. The Complaint Adequately Pleads Fraudulent Intent

Lincoln acknowledges that CNO can establish fraudulent intent by pleading facts showing either (1) Lincoln had a motive and opportunity to defraud or (2) strong circumstantial evidence of Lincoln's conscious misbehavior or recklessness. Br., at 20 (citation omitted). Lincoln also acknowledges, as it must, that the Complaint alleges Lincoln had a motive to commit fraud; it just claims the motive is "farfetched." *Id.* at 13 (it doesn't dispute opportunity). But that motive was [redacted] ¶¶ 699–700. *That* was the jackpot

Lincoln was playing for,[6] not some generalized (and generalizable) desire to keep an existing client's business. Lincoln's motivation to commit fraud was concrete, particularized and specific to Lincoln itself. *See Sharette v. Credit Suisse Int'l*, 127 F. Supp. 3d 60, 95-96 (S.D.N.Y. Aug. 20, 2015) (allegations that defendants engaged in fraud to "strengthen [their] brand name in the lucrative hedge fund [ ] market" and "enhance their ability to compete for that business in the future"—"business that may [have] been unattainable" otherwise—sufficiently pled scienter).[7]

Lincoln nevertheless argues that it couldn't have had the motive it expressly said it had because it terminated the Beechwood engagement before its payday fully materialized, so all it ended up realizing were its standard professional fees from Beechwood. *See* Br., at 20. Lincoln is looking through the wrong end of the telescope. A bank robber doesn't lack a motive to commit robbery because he escaped with only some of the cash he'd intended to grab. Lincoln issued valuation reports that knowingly and fraudulently overvalued Beechwood's investments of Trust assets [redacted] *See* ¶¶ 771–73.[8]

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[6] Lincoln's attempt to trivialize this payout as a "four-figure fixed-fee valuation engagement[]," Br., at 13, is thus disingenuous in the extreme. As Lincoln well knows (and admits), those fees are charged *per investment*. *Id.* at 2. [redacted] would be lucrative, indeed.

[7] *See also Glidepath Holding B.V. v. Spherion Corp.*, 590 F. Supp. 2d 435, 455 (S.D.N.Y. 2007) ("[A] business seeking to . . . induce a beneficial sale has sufficient motive to commit fraud to raise the requisite 'strong inference' of fraud under Rule 9(b)."). As discussed in the accompanying Omnibus Brief, the cases Lincoln cites in respect of motive in the RICO context do not hold differently. *See* Omnibus Br., III(C).

[8] Moreover, the purpose of the "motive and opportunity" element is to support the inference that a statement contained in Lincoln's valuation report was fraudulent at the time it was made. *See Zirkin v. Quanta Capital Holdings Ltd.*, 2009 U.S. Dist. LEXIS 4667, at *35 (S.D.N.Y. Jan. 23, 2009). [redacted]. *See supra* at I(A).

Lincoln also claims it could not have intended to defraud CNO because it "disclos[ed] its information source, process, and rationale" in its reports. Br., at 15. But as discussed below, [redacted] *See, e.g.*, ¶¶ 763–64 [redacted] That is fraudulent.[9]

In any event, at a minimum the Complaint establishes fraudulent intent because it pleads facts constituting strong circumstantial evidence that Lincoln issued its reports with reckless disregard for whether the information in it was true or false. *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 177 (2d Cir. 2015). *See, e.g.*, ¶¶ 723–25, 727, and *supra* at I(A). The Complaint also alleges facts constituting strong circumstantial evidence of Lincoln's conscious misbehavior, as it shows [redacted][10] *See, e.g.*, ¶ 729, and *supra* at I(A). *See Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87, 104 (2d

[9] *See* RESTATEMENT (SECOND) OF TORTS § 529 cmt. a (AM. LAW INST. 1977) ("[A] statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.").

[10] As discussed above, this goes well beyond allegations of insufficient due diligence. Lincoln's cases are therefore inapposite, as they all involved "conclusory allegations" of how defendants *could have* discovered the fraud with proper diligence. *See Prickett v. N.Y. Life Ins. Co.*, 896 F. Supp. 2d 236, 246-47 (S.D.N.Y. 2012) (complaint did not allege facts suggesting defendants were even aware of "red flags"); *In re DNTW Charted Accountants Sec. Litig.*, 172 F. Supp. 3d 675, 688 (S.D.N.Y. 2016) (allegations merely "suggest[ed] that if [defendant] had exercised greater skepticism or performed further procedures, it potentially could have discovered the fraud."). That has no bearing in a case where the defendant [redacted]

Cir. 2001) (a misrepresentation "either known by [the] defendant to be untrue or recklessly made" can support a fraud claim under New York law); *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000) (allegations of "defendants' knowledge of facts or access to information contradicting their public statements" sufficient to establish fraudulent intent).

C. CNO Justifiably Relied on Lincoln's Misrepresentations and Omissions

"As a general matter, dismissals for failure to allege reasonable reliance are heavily disfavored" because the inquiry is so fact specific. *Wild Bunch, SA v. Vendian Entm't, LLC*, 256 F. Supp. 3d 497, 507 (S.D.N.Y. 2017) (Rakoff, J.) (collecting cases). Indeed, dismissal for failure to allege reliance is the "exception, not the rule." *Id.* at 508. In any event, CNO has adequately alleged justifiable reliance.

i. Lincoln mischaracterizes CNO's right to "object" to the valuations, which in any event does not preclude justifiable reliance.

Lincoln first argues that CNO's reliance on the misrepresentations and omissions in its valuation reports could not have been justified because the Reinsurance Agreements gave CNO an opportunity to "object" to the valuation reports and engage a third-party accountant to "verify that the assets were properly valued." Br., at 4. CNO had no reason to "object" to Lincoln's reports because Lincoln represented that it was independent, reviewed substantial data, and never disclosed (but rather concealed) that these were affiliated transactions. What's more, "[t]he mere existence of the right to inquire, without more, is not dispositive." *JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 410 (S.D.N.Y. 2004).

Moreover, Lincoln acknowledges (as it must) that this option was only available to CNO if the valuation reports contained the "information reasonably necessary to verify the compliance of the assets with all Investment Guidelines." Flath Decl., Ex. A at 14; *see* Br., at 4. This includes the Investment Guidelines' requirement that the investments being valued "are issued

by an institution that is not the parent, subsidiary or affiliate of either of the Parties." Flath Decl., Ex. A at Ex. C, p. 52. [redacted] so the information reasonably necessary to have even aroused suspicions was not—by Lincoln's design—in its reports. Moreover, this was not a case in which, had CNO exercised its right to perform an audit, the truth would have be revealed, as Platinum/Beechwood and Lincoln concealed that truth.[11]

ii. Lincoln's "disclaimers" do not preclude justifiable reliance, either.

Lincoln next points to the valuation reports' purported statements that (1) the valuation reports "were intended for Beechwood only" and (2) "Lincoln conducted no independent verification and relied on information provided by Beechwood." Br., at 18–19. Lincoln invites the Court to conclude, apparently on the basis of these purported disclosures, that CNO "could have discovered" its misconduct "at any time" so "there was no justifiable reliance." *Id.* at 19 (quoting *Serino v. Lipper*, 846 N.Y.S.2d 138, 145 (N.Y. App. Div. 2007)). This is nonsense.

"[T]he law is abundantly clear in [New York] that a . . . disclaimer of reliance cannot preclude a claim of justifiable reliance on the . . . misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the [Defendant's] knowledge." *LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 517 (S.D.N.Y. 2014) (internal quotations and citation omitted). Neither condition is satisfied here.

[11] *See Winnick*, 350 F. Supp. 2d at 410 (where the entire complaint is based on the theory that defendant "cooked the books" and "carefully concealed the truth," "[i]t is not at all apparent on th[e] sparse, pre-discovery record, that the true nature . . . would have been revealed upon inspection").

(1) The disclaimers do not cover the specific misrepresentations and omissions alleged in the Complaint. As a threshold matter, Lincoln mischaracterizes the very disclosure language on which it relies. The valuation reports do *not* state simply that "Lincoln conducted no independent verification and relied on information provided by Beechwood," Br., at 19; they state that "Lincoln has relied upon and assumed the accuracy and completeness of the financial information supplied to us and considered in our analysis, and we do not assume any responsibility for independent verification of such information." Flath Decl., Ex. C, Disclaimer and Confidentiality Statement. But that disclosure is meaningless and cannot preclude justifiable reliance where [redacted] *See* ¶¶ 709–51. *See P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 378 (N.Y. App. Div. 2003) (disclaimer "does not preclude plaintiff's [fraud] claim based upon representations that [defendant] made to plaintiff that [defendant] allegedly knew were false, albeit supported by the appraisal, which [defendant] allegedly knew was erroneous"). The same is true of Lincoln's "disclaimer" against third-party reliance, as [redacted] ¶¶ 752–59. In any event, Lincoln cannot use a general disclosure to disclaim actual and specific fraud.[12] General disclaimers of third-party reliance and independent verification fail

[12] *See generally In re Prudential Sec. Ltd. Pshps. Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) ("Cautionary language . . . must precisely address the substance of the specific statement or omission that is challenged . . . . [there is] no protection to someone who warns his hiking companion to walk slowly because there might be a ditch ahead when he knows with near certainty that the Grand Canyon lies one foot away."); *In re IPO Sec. Litig.*, 358 F. Supp. 2d 189, 212 (S.D.N.Y. 2004) (in the context of Securities Act § 11 claim, "if a party is aware of a particular problem worthy of disclosure, the party may not rely on general disclaimers to avoid liability.").

to "track[ ] the substance of the alleged misrepresentation" in the Complaint, and are therefore irrelevant to the justifiable reliance inquiry. *Caiola v. Citibank, N.A.*, 295 F.3d 312, 330 (2d Cir. 2002) (quotation and citation omitted) (general disclaimer did not preclude reasonable reliance in stating 10(b) claim).

(2) The alleged misrepresentations and omissions concern facts peculiarly within Lincoln's knowledge. Disclaimers cannot preclude reliance where the misrepresentations and omissions concern facts peculiarly within the defendant's knowledge. *LBBW Luxemburg*, 10 F. Supp. 3d at 517.[13] Lincoln concedes its valuations were based on *non-public information*. *See, e.g.*, Flath Decl., Ex. C, Disclaimer and Confidentiality Statement. Therefore, the facts regarding the investments' true values and Beechwood's affiliation with Platinum were peculiarly within Lincoln's knowledge. *See LBBW Luxemburg*, 10 F. Supp. 3d at 518 ("the peculiar knowledge exception applies here because the defendant had access to nonpublic information") (internal quotation and citations omitted); *see also Winnick*, 350 F. Supp. 2d at 410.

iii. CNO's "sophistication" does not preclude justifiable reliance.

Lincoln cites the Reinsurance Agreements as the source of a purported "obligation" to confirm Beechwood's valuations, conveniently neglecting to mention that the Reinsurance Agreements provided for such verification by requiring independent third-party valuations—like those Lincoln was supposed to provide—to be made available to CNO. Br., at 19.

Moreover, the complete absence of any indication that something in the valuation reports was amiss is fatal to Lincoln's argument. "Ordinarily there is no duty to exercise due diligence,

[13] For substantially the same reasons, Lincoln had a duty to disclose such information in its reports, making its failure to do so fraudulent. *P.T. Bank*, 301 A.D.2d at 378 (collecting cases holding that under "special facts" doctrine, duty to disclose arises where a "party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair.") (citations omitted).

and [courts] have described the necessary showing of care as minimal diligence." *Winnick*, 350 F. Supp. 2d at 406 (internal quotation and citation omitted). More is required only where "a sophisticated party performs no independent investigation whatsoever, *even when the context or background information available should arouse suspicion*." *Id.* at 407 (emphasis added). As described above, [redacted] prevented any such "red flags" from coming to CNO's attention. As in *Winnick*, Lincoln's valuation reports appeared "healthy"; thus, "the Court cannot say that the reports themselves should necessarily have generated sufficient doubt . . . to trigger a duty to inquire as a matter of law." *Id.* at 409–10; *see also Siegel v. Ford*, 2017 U.S. Dist. LEXIS 150147, at *26 (S.D.N.Y. Sept. 15, 2017) (sophisticated plaintiffs adequately alleged justifiable reliance where they had "no reason to believe that [underlying] documentation did not exist"). In addition, where the misrepresented facts were within Lincoln's peculiar knowledge, an allegation of justifiable reliance will stand regardless of whether the parties are sophisticated or disclaimers are present. *See DNV Inv. P'ship v. Field*, 2017 U.S. Dist. LEXIS 144975, at *18 (S.D.N.Y. Sept. 7, 2017) (denying motion to dismiss based on disclaimers where complaint alleged peculiar knowledge of underlying facts); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co., Inc.*, 651 F. Supp. 2d 155, 181 (S.D.N.Y. 2009) (plaintiffs adequately pled reasonable reliance where ratings agencies had access to "non-public information that even sophisticated investors cannot obtain").[14]

[14] *See also King Cty. v. IKB Deutsche Industriebank AG*, 751 F. Supp. 2d 652, 660–62 (S.D.N.Y. 2010) (allegations that defendant "knew (1) that the Rated Notes were neither safe nor stable, [ ] (2) that the ratings process was flawed and (3) that the Rating Agencies could not issue objective ratings—none of which was disclosed to investors or discoverable through reasonable diligence," sufficient to plead reasonable reliance and scienter (common law fraud) and actual

In sum, given the Complaint's particularized allegations, the fact-specific nature of the inquiry, and the fact "courts are more inclined to find justifiable reliance where the allegations suggest foul play," *LBBW Luxemburg*, 10 F. Supp. 3d at 519, the Complaint adequately alleges reasonable reliance. To the extent, however, it is unclear at this early stage whether further inquiry or publicly-available information would have been sufficient for CNO to determine that Lincoln's valuations were bogus or raise their suspicions, it would be premature to dismiss the fraud and negligent misrepresentation claims. *See DNV Inv. P'ship*, 2017 U.S. Dist. LEXIS 144975, at *18.

D. The Complaint Adequately Pleads Causation

Lincoln claims that its fraudulent misrepresentations and omissions could not have proximately caused CNO's injuries because CNO continued investing with Beechwood well after Lincoln "downgraded several of Beechwood's investments" in its final valuation report. Br., at 19. But proximate cause exists when the "subject of the fraudulent statement or omission was the cause of the actual loss suffered"—*i.e.*, when it is alleged to have "caused *at least some* of the economic harm it suffered." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 402–03 (2d Cir. 2015) (emphasis added) (quotation and citation omitted). "[C]onclusive proof of that causal link" is not required; CNO needs only "allege sufficient facts to raise a reasonable inference that [Lincoln's] overall involvement caused an ascertainable portion of its loss." *Id.* at 404.[15] That is precisely what CNO has done. ¶¶ 728, 781–82.[16]

knowledge (aiding and abetting fraud); *id.* at 655 (coupled with allegations including that the defendant and the ratings agencies "disseminated the false and misleading ratings with th[at] knowledge," allegations also pleaded substantial assistance (aiding and abetting fraud).

[15] Lincoln's reliance on *Picard v. Kohn*, 907 F. Supp. 2d 392, 397 (S.D.N.Y. 2012) is misplaced, as *Picard* applies a standard of causation distinct to RICO claims.

[16] As such, Lincoln's claim that the Complaint fails to "specify[ ] *when* [CNO] allegedly relied on the reports or what specific actions they would have taken," Br., at 18, rings hollow.

Lincoln also claims it is off the hook for CNO's damages because CNO did not terminate its relationship with Beechwood when Lincoln did. But that was precisely *because* of the misrepresentations and omissions in Lincoln's reports. That Lincoln "downgraded several of Beechwood's investments," Br., at 19, in its final report does nothing to change that fact, as its report did *not* disclose the critical facts, for example:

- That Lincoln reduced the fair values of multiple investments because "Lincoln learned more about the ties between Beechwood and Platinum," as it readily concedes now. Br., at 22.
- What the "ties between Beechwood and Platinum" were affecting the investments. Br., at 22. In fact, *none* of the four investments Lincoln downgraded even reference Platinum. *See* ¶ 768; Flath Decl., Ex. F at §§ 8, 10, 16, 17.
- Why the "ties between Beechwood and Platinum" would have impacted the investments' fair values: that is, because Beechwood and Platinum were affiliates. Br., at 22.

Indeed, the report did not disclose that *Lincoln* had downgraded the investments at all. It represented that *Beechwood* had determined the (now reduced) fair values, and that, "[b]ased on our analysis, Lincoln has concluded that the Beechwood fair values as of December 31, 2014 as shown above are reasonable." Flath Decl., Ex. F at 2–4.

Lincoln now implies that it downgraded the investments *because* it "learned more about the ties between Beechwood and Platinum." Br., at 22. ***If that is true, then Lincoln's final report is fraudulent for the additional reason that it affirmatively misrepresented the reasons why each of the investments' fair values were purportedly reduced, as none of them identify the reason as being ties between Beechwood and Platinum.*** *See* ¶ 768; *see* Flath Decl., Ex. F at § 8 (China Horizon valuation dropped due to "recent delays of the joint venture's regulatory approval"); *id.* at § 10 (Implant Sciences valuation dropped due to "increasing refinancing risk approaching the March 2015 maturity"); *id.*at § 16 (Salt Lake valuation dropped due to "company's failure to service the debt and deterioration in enterprise value for the company"); *id.* at § 17 (SMRTV valuation dropped due to investment amount and percentage of warrants

making up initial cost). In short, Lincoln's attempt to avoid the natural consequences of its misconduct only further proves its culpability.

E. CNO Had a Special Relationship with Lincoln

A plaintiff establishes a special relationship where it shows "(1) the defendant had awareness that its work was to be used for a particular purpose; (2) there was reliance by a third party known to the defendant in furtherance of that purpose; and (3) there existed some conduct by the defendant linking it to that known third party evincing the defendant's understanding of the third party's reliance." *Bayerische Landesbank v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 59 (2d Cir. 2012) (citations omitted). Lincoln argues that the negligent misrepresentation claim against it fails because the Complaint does not allege a "special relationship" between Lincoln and CNO, Br., at 21, ignoring swaths of paragraphs alleging exactly that. *See* ¶¶ 827–30.

Firs [redacted] its reports were intended to provide independent, positive assurance of the value of Beechwood's investments of Trust assets. [redacted] *See* ¶¶ 753, 758. *Second*, CNO clearly received and relied on Lincoln's reports for the purpose of determining the value of Trust assets being invested by Beechwood. *See, e.g.*, ¶ 728. Lincoln's reliance on cases involving third parties entirely unknown to the defendants are thus inapposite, as CNO's identity was clearly "known" to Lincoln. Br., at 21 (citing *Anschutz v. Merrill Lynch & Co., Inc.*, 690 F.3d 98, 114–15 (2d Cir. 2012) (rating agency defendants did not know identity of the third-party relying on its publicly available, published reports)). *Third*, Lincoln had actual and specific knowledge that CNO was receiving and relying on its reports, in real time, for the purpose of valuing Trust assets. Among other examples, the Complaint alleges

[redacted]

[redacted] ¶ 755; *see also* ¶¶ 752–58.[17]

Lincoln seems to suggest (without supporting authority) that there can be no "special relationship" without a direct communication between it and CNO. However, it cites a case that makes clear that all that is required is some conduct by Lincoln evincing that it understood a third party was relying on its reports. Br., at 21 (citing *N.Y. State Workers' Comp. Bd. v. Comp. Risk Managers, LLC*, 67 N.Y.S. 3d 792, 804-06 (Sup. Ct. 2017) (no special relationship where complaint did not allege affirmative conduct by accounting firm evincing its understanding that plaintiff relied on its reports, only that third-party reliance was "foreseeable")). In any event, the "determination of whether a special relationship exists is essentially a factual inquiry" that should not be resolved on the pleadings. *Suez Equity Inv'rs, L.P.*, 250 F.3d at 104.

Even if the Court were to find the allegations here insufficient to establish a special relationship, however, the negligent misrepresentation claim against Lincoln still survives because the Complaint alleges (1) "the person making the representation [Lincoln] held or appeared to hold unique or special expertise" and (2) "the speaker [Lincoln] was aware of the use to which the information would be put and supplied it for that purpose." *See Suez Equity Inv'rs, L.P.*, 250 F.3d at 103 (quoting factors in *Kimmell v. Schaefer*, 652 N.Y.S.2d 715, 719 (N.Y. 1996), for a court to weigh in analyzing justifiable reliance). These factors are present here, as Lincoln held itself out as a sophisticated financial services firm with specialized knowledge of and unique expertise in valuations, *see, e.g.*, ¶ 753, and [redacted] the information it

[17] Having satisfied all three elements, *Antidote* is irrelevant. *Antidote Int'l Films, Inc. v. Bloomsbury Publ'g., PLC*, 467 F. Supp. 2d 394, 402 (S.D.N.Y. 2007) (no special relationship where defendants only had knowledge of particular purpose to which plaintiff put information).

provided to Beechwood was being supplied to and relied on by CNO for the purpose of determining the value of Trust assets being invested by Beechwood, positively assuring CNO that those investments were safe, reliable, and valuable. *See, e.g.*, ¶ 728.[18]

II. THE COMPLAINT ADEQUATELY PLEADS AIDING AND ABETTING CLAIMS AGAINST LINCOLN

Lincoln does not dispute that the underlying fraud and breach of fiduciary duty claims are sufficiently pleaded. Instead, Lincoln argues that the Complaint does not sufficiently plead that Lincoln actually knew about or substantially assisted them.[19] Lincoln is wrong on both fronts.

A. The Complaint Sufficiently Alleges Actual Knowledge

Lincoln makes two arguments in support of its claim that actual knowledge is insufficiently pleaded. *First*, it maintains that the Complaint does not allege Lincoln knew of Platinum's "Ponzi-like scheme." Br., at 22. This is a red herring. "The knowledge requirement of an aiding and abetting fraud claim is satisfied by alleging actual knowledge *of the underlying fraud*." *King Cty.*, 751 F. Supp. 2d at 664 & n. 86 (citation omitted) (emphasis added). The underlying fraud (and accompanying breaches of fiduciary duty) is the fraudulent overvaluation of Beechwood's investments of the Trust assets, including investments that were actually the product of self-dealing between Beechwood and Platinum, which were required to be

[18] Lincoln's citation to *Barron Partners, LP v. LAB123, Inc.*, 593 F. Supp. 2d 667 (S.D.N.Y. 2009), is therefore inapposite. *Id.* at 672 (complaint failed to establish that defendant used any special expertise or knowledge in making the alleged misrepresentations).

[19] To state a claim for aiding and abetting fraud under New York law, a plaintiff must plead (1) facts showing the existence of a fraud; (2) defendant's knowledge of the underlying fraud; (3) that the defendant provided substantial assistance to advance the fraud's commission; and (4) damages. *King Cty.*, 751 F. Supp. 2d at 664 n. 82 (citing *Wight v. BankAmerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000)). These elements also apply to claims for aiding and abetting breaches of fiduciary duty. *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 533 (S.D.N.Y. 2009). While Lincoln claims that both aiding and abetting claims should be dismissed, its brief fails to address the breach of fiduciary duty claim. Giving Lincoln the benefit of the doubt, we address why neither count fails.

independently valued (and safely and prudently invested). The Complaint plainly alleges this fraud, [redacted] in detail. *See, e.g.*, ¶¶ 707, 752–59. *See also King Cty.*, 751 F. Supp. 2d at 665 ("A defendant's active participation in fraud creates more than a reasonable inference that it had knowledge of it.").

Indeed, Lincoln also [redacted] ¶¶ 692–706. Thus, Lincoln's "actual knowledge relates to the core of the alleged fraud." *Nathel v. Siegal*, 592 F. Supp. 2d 452, 469–70 (S.D.N.Y. 2008) (where fraud involved tricking investors into thinking partnerships were directed by competent partners, defendants had actual knowledge of fraud when they signed agreements saying they would be performing roles in partnership they knew they would not be performing).[20]

Second, Lincoln asserts that the Complaint alleges only that Lincoln "should have been able to deduce the fraud on the basis of red flags." Br., at 23. Not true. As detailed above, the Complaint alleges that Lincoln [redacted] *See supra* at I(A); *see e.g.*, ¶ 741 [redacted] Further, Lincoln's reports containing these misrepresentations were themselves the mechanism by which Beechwood's breaches of its fiduciary duty to CNO occurred. Tellingly, Lincoln claims that when it "learned more about the ties between Beechwood and

[20] Lincoln points to the one instance in which it did not remove a reference to Platinum [redacted] as purported proof that it was not working hand-in-glove with Beechwood. Br., at 8. Aside from being at odds with its own argument that it did only as Beechwood said, Lincoln ignores the numerous specific examples identified in the Complaint in which Lincoln did exactly that. Lincoln "cannot secure dismissal by cherry-picking only those allegations susceptible to rebuttal and disregarding the remainder." *In re Philip Servs. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 476 (S.D.N.Y. 2004).

Platinum . . . it reduced the value of multiple investments that were previously marked at 100% fair value." Br., at 22–23. In other words, Lincoln concedes the "ties" between Beechwood and Platinum precluded it from issuing a 100% fair value rating—yet that's exactly what Lincoln did in every valuation report it issued, [redacted]

B. The Complaint Sufficiently Alleges Substantial Assistance

A defendant provides substantial assistance if it "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed," and its action "proximately causes the harm on which the primary liability is predicated." *King Cty.*, 751 F. Supp. 2d at 652 (internal quotations and citations omitted). "Where the primary fraud claim is predicated on misrepresentations in documents, substantial assistance usually involves assistance in the preparation or dissemination of the documents." *Nathel*, 592 F. Supp. 2d at 470.

Lincoln played a crucial role in furthering Beechwood's fraud by fraudulently overvaluing dozens of investments that comprised the entirety of Beechwood's investment portfolio of Trust assets. *See, e.g.*, ¶ 782. Those reports enabled Beechwood to fraudulently withdraw millions in "surplus" while avoiding its obligations to top-up the Trusts, forcing CNO to inject millions of dollars into the Trusts upon recapture, while enabling Beechwood to continue serving its primary purpose of providing a source of capital to Platinum. *Id.*

To be sure, the harm suffered by CNO was the direct and reasonably foreseeable result of Lincoln's misconduct: [redacted] was supposed to be providing "independent" valuations for investments [redacted] that Beechwood was providing Lincoln's fraudulent valuations to CNO, and that CNO was relying on them for the purpose of valuing Trust assets. *See* ¶¶ 698–99 [redacted]

[redacted]; ¶¶ 707–59. These facts support a plausible allegation that it was at least reasonably foreseeable to Lincoln that its conduct would cause CNO to accept its bogus valuations and continue with the Reinsurance Agreements. That CNO suffered losses upon recapture, as a direct result of the Trust assets not being worth what Beechwood and Lincoln said they were, is obvious.[21]

Moreover, the Complaint alleges that Lincoln took affirmative actions in furtherance of the scheme, not just that it "fail[ed] to heed certain 'red flags.'" Br., at 24. For this reason, Lincoln's attempt to liken CNO to the plaintiff in *SPV OSUS Ltd. v. AIA LLC*, 2016 U.S. Dist. LEXIS 69349 (S.D.N.Y. May 26, 2016) (Rakoff, J.) is misplaced. Br., at 23–24. In fact, the Complaint alleges a theory akin to the *SPV OSUS* plaintiff's first alternative theory of proximate causation—but without the deficiency that was fatal to the plaintiff's claims in that case. That is, by misrepresenting itself as an independent and impartial third-party valuation provider reviewing Beechwood's investments, when in fact it was nothing of the sort, Lincoln "helped foster the illusion of legitimacy" of Beechwood. *SPV OSUS Ltd.*, 2016 U.S. Dist. LEXIS 69349, at *21 (quotation omitted). But unlike *SPV*, CNO has specifically alleged that it relied on these misrepresentations, supplying the nexus that was missing in that case. *See, e.g.*, ¶¶ 715, 719, 728, 736. Thus, the aiding and abetting claims should survive Lincoln's motion to dismiss.

C. The Unjust Enrichment and Constructive Trust Claims Survive

Lincoln argues that the unjust enrichment claim fails because the Complaint does not allege that Lincoln had either a special relationship with or performed services for CNO. But

[21] *See Nathel*, 592 F. Supp. 2d at 470 (defendants signing partnership agreements misrepresenting themselves as management partners and concealing their inexperience proximately caused harm to plaintiffs because it was reasonably foreseeable that this would cause plaintiff to invest and suffer loss).

those are not elements of an unjust enrichment claim. CNO needs only show (1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution. *See Childers v. N.Y. & Presbyterian Hosp.*, 36 F. Supp. 3d 292, 305 (S.D.N.Y. 2014) (quotations and citations omitted). Lincoln does not argue that CNO has failed to satisfy any of those elements, and they have not.

As explained above, the Complaint is rife with allegations that Lincoln's fraudulent misrepresentations and omissions in each of its valuation reports (for which Lincoln was paid and able to grow its footprint in the portfolio valuation space while [redacted] falsely assured CNO that the Trust assets were being used to make safe, reliable, and valuable investments. These reports kept CNO from terminating the Reinsurance Agreements, and thus caused it to suffer a loss when it later had to recapture the Trust assets and post additional reserves. *See* ¶¶ 781–82. No more is needed.

D. The Complaint Has Pled Several Underlying Causes of Action, So the Contribution and Indemnity Claims against Lincoln Survive

The entirety of Lincoln's argument that claims for contribution and indemnity are improper rests on the premise that CNO did not set forth *any* facts indicating that Lincoln committed *any* wrongdoing whatsoever. Br., at 25. This is nonsensical. As discussed above, CNO has sufficiently pled several underlying causes of action and the Complaint is jam-packed with allegations concerning Lincoln's continuous and dishonorable fraud against CNO. Thus, the contribution and indemnification claims should be sustained. *See Amguard Ins. Co. v. Getty Realty Corp.*, 147 F. Supp. 3d 212, 218–22 (S.D.N.Y. 2015) (denying a motion to dismiss claims of contribution and indemnification where the operative complaint plausibly alleged defendant may be liable for a tort).

III. THE COMPLAINT ADEQUATELY PLEADS CIVIL CONSPIRACY

"Under New York law, a conspiracy may be alleged for the purpose of showing that a wrong was committed jointly by the conspirators and that because of their common purpose and interest, the acts of one may be imputed to the others." *Fazio v. Ranestorm Entm't, LLC*, 2015 U.S. Dist. LEXIS 44681, at *16–17 (S.D.N.Y. Mar. 31, 2015) (Rakoff, J.) (internal quotation and citation omitted). And, where the underlying tort claims remain, dismissal is improper. *Id.* at *17. For the reasons set forth above, CNO's state law claims should survive. Accordingly, the civil conspiracy claim should survive, as well.

IV. IF THIS COURT MUST DISMISS CNO'S CLAIMS, IT SHOULD DO SO WITH LEAVE TO AMEND

In the unlikely event that this Court finds CNO's claims insufficient to withstand a motion to dismiss, it should dismiss such claims with leave to amend. "The court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Indeed, the policy of granting leave to amend is particularly appropriate when a claim is dismissed under the Rule 9(b) pleading standard, which applies to [most] of the claims here.[22]

CONCLUSION

For the foregoing reasons, this Court should deny Lincoln's Motion to Dismiss.

[22] *See Luce v. Edelstein*, 802 F.2d 49, 56-57 (2d Cir. 1986) ("Complaints dismissed under Rule 9(b) are 'almost always' dismissed with leave to amend") (citation omitted)); *Gebbs Healthcare Solutions, Inc. v. Orion Healthcorp., Inc.*, 2017 U.S. Dist. LEXIS 51422, at *19 (S.D.N.Y. Apr. 2, 2017) (granting leave to amend counterclaims because defendant had not been given "prior opportunity to amend its fraud counterclaim in response to an opinion of the Court" as "the Court [could not] conclude that allowing [defendant] to amend its fraud counterclaim would be futile"); *see also Forman v. Davis*, 371 U.S. 178, 182 (1962) (noting that refusing to grant leave to amend without justification is an abuse of discretion "and inconsistent with the spirit of the Federal Rules."); *Sky Med. Supply Inc. v. SCS Support Claims Servs.*, 17 F. Supp. 3d 207, 237 (E.D.N.Y. 2014) (granting leave to amend RICO claims).

Dated: June 12, 2019

Respectfully submitted,

ALSTON & BIRD LLP

By: */s/Adam J. Kaiser*

Adam J. Kaiser
John M. Aerni
Daniella P. Main
Jenna C. Polivy
90 Park Avenue
New York, New York 10016
(212) 210-9400
adam.kaiser@alston.com
john.aerni@alston.com
daniella.main@alston.com
jenna.polivy@alston.com

Attorneys for Bankers Conseco Life Insurance Company and Washington National Insurance Company

CERTIFICATE OF SERVICE

It is hereby certified that on this 12th day of June, 2019, a copy of the foregoing was served through the Court's electronic filing system as to all parties who have entered an appearance in this adversary proceeding.

Dated: June 12, 2019

Respectfully submitted,

ALSTON & BIRD LLP

By: */s/Adam J. Kaiser*

Adam J. Kaiser
John M. Aerni
Daniella P. Main
Jenna C. Polivy
90 Park Avenue
New York, New York 10016
(212) 210-9400
adam.kaiser@alston.com
john.aerni@alston.com
daniella.main@alston.com
jenna.polivy@alston.com

Attorneys for Bankers Conseco Life Insurance Company and Washington National Insurance Company