UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	
MELANIE L. CYGANOWSKI, AS RECEIVER, BY AND FOR PLATINUM PARTNERS CREDIT OPPORTUNITIES MASTER FUND LP, et al.,	Master Case No. 1:18-cv-06658 (JSR)
Plaintiffs,	Case No. 1:18-cv-12018 (JSR)
v.	
BEECHWOOD RE LTD., et al.,	
Defendants.	
WASHINGTON NATIONAL INSURANCE COMPANY and BANKERS CONSECO LIFE INSURANCE COMPANY,	
Third-Party Plaintiffs,	
v.	
MARK NORDLICHT, et al.,	
Third-Party Defendants.	

THIRD-PARTY DEFENDANT LINCOLN INTERNATIONAL LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE THIRD-PARTY COMPLAINT

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The Insurers' Opposition still leaves unanswered the key question of what precisely they believe was false and why. Yet to survive a motion to dismiss, Rule 9 places the onus on the Insurers to allege specifically what Lincoln allegedly knew and lied about, when it did so, and to whom. At this point, despite having had the opportunity to cherry pick a trove of Lincoln's emails, memoranda, and draft valuations in their Complaint (all obtained via a prior arbitration and third-party subpoena in this litigation), the Insurers still fail to satisfy this basic pleading requirement. When one attempts to pinpoint the specific alleged lies and the facts surrounding them, the Complaint's legal and factual shortcomings emerge.

I. THE INSURERS' RICO CLAIM SHOULD BE DISMISSED

The Insurers insist that the PSLRA has no bearing on their RICO claims against Lincoln, despite taking the opposite position against the Receiver's nearly identical RICO claims, which they declare are "barred because they relate to the 'purchase or sale of securities.'" (Dkt. at 345 17.) The Court should reject this attempt to wield the PSLRA with one hand and disavow it with the other. Misrepresentations about the existence or nature of assets in which a fraudster claims to invest his victim's funds are "integral to the purchase and sale of [ ] securities" and thus barred by the PSLRA. *In re Platinum-Beechwood Litig.*, No. 18-cv-6658 (JSR), 2019 WL 2569653, at *5 (S.D.N.Y. June 21, 2019) (Rakoff, J.); *In re Platinum-Beechwood Litig.*, No. 18-CV-6658 (JSR), 2019 WL 1759925, at *6 (S.D.N.Y. Apr. 22, 2019) (Rakoff, J.). And that is precisely what the Insurers claim—that the co-conspirators "invest[ed] the reinsurance trust assets in Platinum-controlled funds and entities in non-arm's length transactions designed to benefit themselves and Platinum."[1] (Dkt. 75 (Third-Party Complaint, "Compl.") ¶609.)

[1] *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447 (S.D.N.Y. 2009), is unavailing because there the underlying fraud involved illegal tax shelters and any investments were incidental. *See In re Am. Int'l Grp. Sec. Litig.*, 689 F.3d 229 (2d Cir. 2012) (describing allegation that AIG violated *(cont'd)*

Recognizing this problem, the Insurers try to carve out a portion of their loss—the $42 million ceding commission—as falling outside of the PSLRA bar. (Dkt. 439 at 10-11.) That maneuver is foreclosed, however, by this Court's recent decision that the alleged "misstatement of asset values, and the attendant withdrawal of unearned fees" falls under the PSLRA. *In re Platinum-Beechwood Litig.*, 2019 WL 2569653 at *5.[2]

Even without the PSLRA, the Insurers' RICO claims still founder because Lincoln's involvement in this alleged enterprise lasted less than 15 months, well short of what is needed to establish a pattern of racketeering activity under RICO. *See In re Platinum-Beechwood Litig.*, 2019 WL 2569653 at *5; *Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 530-31 (S.D.N.Y. 2018) (Rakoff, J.) (dismissing SHIP's sections (c) and (d) claims where it had failed to allege that the defendants' predicate acts occurred over a two-year period).[3] In an effort to salvage their theory, the Insurers contend that for RICO conspiracy claims, the Court must look to the pattern of racketeering as a whole rather than the duration of Lincoln's alleged participation, citing a single district court opinion. (Dkt. 439 at 14 (citing *N.Y. Dist. Council of Carpenters Pension Fund v. Forde*, 939 F. Supp. 2d 268 (S.D.N.Y. 2013)).) But *Forde* runs contrary to established precedent in this Circuit (and decisions in this litigation), which treat conspiracy no different from substantive racketeering claims—i.e., a defendant's participation in the conspiracy must exceed two years. *See, e.g.*, *First Cap. Asset Mgmt., Inc. v. Satinwood, Inc.*,

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the securities law through "sham" reinsurance agreements to artificially increase its share price).

[2] In any event, the ceding commission cannot form the basis of RICO claims against Lincoln because those payments occurred at the outset of the Reinsurance Agreement (Flath Decl., Ex. A at 7), before Lincoln even began its engagement with Beechwood.

[3] The Insurers' attempt to liken this case to *Fresh Meadow Food Servs., LLC v. RB 175 Corp.*, 282 F. App'x 94 (2d Cir. 2008), misfires because that case involved predicate acts that occurred over a three-and-a-half-year period.

385 F.3d 159, 180 (2d Cir. 2004); *Cofacredit S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242-45 (2d Cir. 1999); *Senior Health Insur. Co. of Pa*, 345 F. Supp. 3d at 530-31.[4]

Finally, the Insurers fail to allege that Lincoln "operated or managed" the affairs of the RICO enterprise. They never allege that Lincoln directed or knowingly orchestrated the Ponzi scheme to siphon funds from Beechwood to Platinum and its owners. They do not make these allegations because that did not happen.[5] The Insurers' RICO claims thus merit dismissal.

II. THE INSURERS' STATE LAW CLAIMS SHOULD BE DISMISSED

A. The Insurers Fail to Plead Essential Elements of their Misrepresentation Claims

In response to Lincoln's argument that the pleadings lack particularity, the Insurers recycle the same conclusory and generalized allegations that cannot meet Rule 9's requirements. That the Insurers only muster these bare allegations against Lincoln, despite already possessing Lincoln's internal documents, underscores both that these claims must be dismissed and the futility of amendment.

1. The Insurers Fail to Identify an Actionable Misrepresentation

The Insurers must plead specific allegations that Lincoln either knew of Platinum's Ponzi scheme or knowingly made misrepresentations to the Insurers. They have done neither. The Insurers implicitly concede—as they must—that Lincoln knew nothing of the alleged "Ponzi-like scheme" or the diversion of assets. (Dkt. 255 (Opposition Brief, "Opp.") at 20.) And, despite

[4] Either way, the failure to allege a substantive RICO violation against Lincoln means that the conspiracy claim falls away as well. *See First Cap. Asset Mgmt., Inc.*, 385 F.3d 159, 182 (2d Cir. 1999). Nor, in any event, do the the Insurers plead facts plausibly indicating that Lincoln knowingly participated in the alleged enterprise, as required for a § 1962(d) claim. *See infra.*

[5] The Insurers' reliance on *Baisch v. Gallina*, 346 F.3d 366, 376–77 (2d Cir. 2003), is misplaced, as the defendants there were alleged to have exercised discretionary authority and direction over the enterprise far greater than Lincoln's alleged involvement.

their insistence that the Complaint contains "painstaking detail" of the various false representations made by Lincoln (*id.* 5), it does nothing of the sort. Instead, the Complaint and the Opposition make clear that the Insurers' fraud theory—that Lincoln's valuations were knowingly inaccurate and incomplete—are baseless. Their accusations on this score fall into three theories; none satisfies Rule 9.

The Insurers first claim the valuations were false because Lincoln "knew that the documentation needed to actually determine and analyze their fair values either did not exist or had not been provided to Lincoln" and that Lincoln represented that it "*had in fact reviewed* myriad financial information in determining that each investment's fair value was reasonable." (*Id*. 5-6.) The Court, and Lincoln, is left to guess, however, what information Lincoln *should* have reviewed or claimed to have reviewed but did not.[6] This cannot suffice for a fraud claim. *See Phoenix Light SF Ltd. v. Goldman Sachs Grp., Inc.*, 993 N.Y.S.2d 645 (Sup. Ct. 2014).

The Insurers also contend that Lincoln falsely represented that it acted as an "independent financial advisor" in rendering its valuations of Beechwood's investments. (Opp. 8.) But the allegations the Insurers offer in support of this theory—that Lincoln disregarded its own valuation methodologies and relied on information and direction provided by Beechwood—are meaningless without an accompanying allegation that Lincoln *knew* the information provided by Beechwood was false. (*See, e.g.*, Compl. ¶746.) The Insurers also fail to grapple with the express disclaimers in every valuation, which disclosed that Lincoln relied on information "provided by

[6] The Insurers claim that the valuations "explicitly represented that Lincoln had in fact reviewed myriad financial information" and that Lincoln "had done nothing of the sort," citing paragraphs in which Lincoln allegedly sought and did not receive certain records from Beechwood. (Opp. 6 (citing Compl. ¶¶712-14, 723-25, 729).) Yet the Insurers fail to identify one financial record Lincoln claimed falsely to have reviewed in its valuations (despite promising the Court "myriad" examples).

Beechwood" and did so without "independent verification." The Insurers are left to quibble about whether Lincoln should have sought more information, but they proffer no particularized allegations about how Lincoln lied about the information it claimed to have reviewed.

The final theory from the Insurers—that the valuations hid self-dealing—also suffers from a fatal flaw. The Insurers start from the premise that Lincoln knew that Platinum and Beechwood were "related" or "affiliated," citing a variety of allegations, and leap to the conclusion that the trust asset investments were the product of self-dealing and that Lincoln could not have issued valuations in accordance with Financial Accounting Standards Board Codification ("ASC") principles. (Opp. 6-7.) But that theory would require Lincoln to know that the *investments themselves* were covertly controlled by Platinum, a proposition the Complaint fails to support. Instead, it summarily asserts that Lincoln "knew . . . that many of Beechwood's . . . investments were in Platinum and Platinum-related entities" (Compl. ¶734) without any supporting detail about which investments Lincoln knew were actually Platinum or Platinum-related entities and how Lincoln became aware of that.

At most, the Insurers allege that Lincoln was aware that Platinum provided guarantees for five Beechwood investments and that a dozen of Beechwood's investment entities had "some affiliation" with Platinum. (Compl. ¶724).[7] But the Insurers have not, and cannot, allege that Platinum's provision of security and some vague, unspecified "affiliation" can be equated with *control* of the investments. Moreover, to the extent Lincoln was aware Platinum had any involvement with the Beechwood investments, Lincoln disclosed that fact in each of its

[7] Here, the Insurers allege that Beechwood told Lincoln that a dozen more of its investments had "no affiliation" to Platinum despite them being entities in which Platinum held a significant interest. Significantly, they have not alleged that Lincoln was aware this representation was false and admit that Beechwood told Lincoln "a lie." (Compl. ¶733.)

valuations. (*See, e.g.*, Flath Decl., Ex. F at 124 ("The guarantee provided by Platinum Partners further substantiates a value range including par.").)

After those theories fall away, the Insurers are left with nothing more than vague critiques of Lincoln's methodologies (Opp. 8), which cannot give rise to claims for fraud.

2. The Insurers Fail to Allege Reliance

Equally flawed is the Insurers' reliance theory. In their telling, Lincoln's awareness that the Insurers received the valuations meant that Lincoln understood "as a matter of industry practice and basic commonsense" that the Insurers were relying on them for their investments. (Opp. 13; Compl. ¶753.) But that logical leap defies commonsense and industry practice, not to mention Rule 9. If the Insurers needed assurances they could rely on for their investment of hundreds of millions of dollars, they could have paid a valuation firm to do so. They cannot, however, obtain valuations prepared for another party, disregard the non-reliance language, and then march into court claiming justifiable reliance. Any awareness Lincoln had that the Insurers received the valuations is beside the point when Lincoln stated in every one of them that they could not be relied on. The Insurers are left with no facts or applicable authority to excuse their willful disregard of this straightforward non-reliance language. (Flath Decl., Ex. C at 5-6; Exs. G-M; *see also* Dkt. 182 (Lincoln Brief, "Br.") at 6-7.)

The Insurers also seek to disregard the disclaimer that Lincoln assumed the accuracy of information from Beechwood (*id.*), asserting that the language "does not cover the specific misrepresentations and omissions alleged in the Complaint." (Opp. 13.) As support, the Insurers cite *Caiola v. Citibank, N.A., New York*, 295 F.3d 312, 330 (2d Cir. 2002) and *P.T. Bank Cent. Asia, New York Branch v. ABN AMRO Bank N.V.*, 754 N.Y.S.2d 245, 251-52 (App. Div. 2003), both of which involved misrepresentations that were made wholly apart from the document that contained the disclaimer. That is not the case here—the disclaimers plainly cover the

representations at issue. *Coraud LLC v. Kidville Franchise Co.*, 109 F. Supp. 3d 615, 620 (S.D.N.Y. 2015) (to "track" a representation, a disclaimer need only cover "the very matter . . . as to which [the plaintiff] now claims it was defrauded").

The Insurers also deem these disclaimers "meaningless," relying on a case involving "conflicting promises and disclaimers that were designed to solicit investment," *see LBBW Luxembourg S.A. v. Wells Fargo Sec. LLC*, 10 F. Supp. 3d 504, 517 (S.D.N.Y. 2014), a circumstance not found here.[8] The Complaint never alleges that Lincoln offered assurances that contravened its disclaimers—or that Lincoln was soliciting investments by anyone.

As a last resort, the Insurers urge the Court to disregard the disclaimers because the alleged omissions relate to facts peculiarly within Lincoln's knowledge. That theory ignores the Insurers' right to audit Beechwood's books and records (Br., Ex. A § 3.4), to "verify" that the assets were properly valued (*id.* at § 4.5(a)), and to engage a third-party accountant to audit the valuation of assets (*id.* at § 4.5(b)),[9] rights that Lincoln lacked in its engagement with Beechwood. Nor may the Insurers plausibly claim they were unaware that Platinum and Beechwood were affiliated, the principal accusation against Lincoln. The Insurers routinely met with Beechwood executives at Platinum's office (Compl. ¶¶562, 565, 568, 576), Beechwood's marketing materials identified its ties to Platinum (Compl. ¶568), and the Insurers' emails reflect their "knowledge of the deep ties between Platinum and Beechwood," including their "common

[8] Two of the cases relied on by the Insurers, *In re Prudential Sec. Ltd. P'Ships Litig.*, 930 F. Supp. 68, 72 (S.D.N.Y. 1996) and *In re IPO Sec. Litig.*, 358 F. Supp. 2d 189, 212 (S.D.N.Y. 2004) are inapposite because they dealt with the disclosure of risk in the context of the "bespeaks caution doctrine," which is not an issue here.

[9] The Insurers argue that they could not exercise their right to verify Beechwood's valuations unless they contained the "information reasonably necessary to verify the compliance . . . with all Investment Guidelines." (Opp. 11.) Yet it was Beechwood, as party to the Reinsurance Agreements, and not Lincoln, that was obligated to provide this information.

ownership and management and deep personal relationships." (Dkt. 84 ¶¶9, 112-13, 136-39, 151-59, 196-200; Compl. ¶470 n.5 (incorporating Receiver's Complaint).)

Against that backdrop, the Insurers altogether fail to articulate with any specificity which facts were peculiarly within Lincoln's knowledge, much less facts that the Insurers had "no independent means of ascertaining." *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1542 (2d Cir. 1997).[10] The cases cited by the Insurers only confirm the point. In *LBBW*, an investor in collateralized debt obligations was deemed to have had no ability to uncover the seller's alleged knowledge of "the discrepancy between [the fraudulent] internal valuation and [the] stated valuation of [the] collateral" at issue. 10 F. Supp. 3d 504, 517 (S.D.N.Y. 2014). Likewise, in *JP Morgan Chase v. Winnick*, 350 F. Supp. 2d 393, 410 (S.D.N.Y. 2004), several banks that loaned money to a company that allegedly "cooked the books" were not held responsible for failing to identify the fraud. Lincoln, however, was a third party with access to some, but not all, of Beechwood's records, unlike the Insurers, who enjoyed unrestricted access rights. And the Insurers themselves claim that the alleged errors in Lincoln's valuations were apparent in light of public information available to the Insurers. (Compl. ¶745.) The Insurers are left with nothing to support their justifiable reliance on Lincoln's valuations.

3. The Insurers Fail to Allege Actionable Intent

The Insurers suggest that Lincoln perpetuated a Ponzi scheme doomed to fail in exchange for a modest chance at additional business with a fraudster, citing a line about potential future

[10] The "special facts" doctrine applies only where the information at issue was not readily available to the plaintiff and the defendant knew that the plaintiff was acting on the basis of mistaken knowledge. *Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank*, 57 F.3d 146, 155 (2d Cir. 1995).

business plucked from an internal Lincoln memorandum. (Opp. 8; Compl. ¶¶699-700.) [11] Besides its implausibility, that theory cannot be enough without trivializing this pleading requirement.[12] *Edison Fund v. Cogent Inv. Strategies Fund, Ltd.*, 551 F. Supp. 2d 210, 227 (S.D.N.Y. 2008) ("To accept a generalized allegation of motive based on a desire to continue to obtain management fees would read the scienter requirement out of the statute."). *Sharette v. Credit Suisse Int'l*, 127 F. Supp. 3d 60, 95 (S.D.N.Y. 2015), the case the Insurers champion, dealt with the prospect of "an extremely profitable market, potentially worth billions of dollars," in marked contrast to the facts here, where Lincoln's third-party valuation services contemplated modest sums that paled in comparison to the alleged fraud proceeds (and the Insurers' alleged losses) by orders of magnitude, not to mention that Lincoln had no qualms about turning down prospective fees by firing the client after little more than a year. (Br. 2; Compl. ¶¶770–73.)

Given the absence of a credible motive, the Insurers turn to *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 177 (2d Cir. 2015), for the proposition that recklessness is enough.[13] *Loreley* held that a fraud claim based on recklessness may lie if the complaint "specifically allege[s] defendants' knowledge of facts or access to information contradicting their public statements." *Id.* But the Complaint contains nothing akin to that—i.e.,

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[11] As this court has recognized, this theory is implausible. "The notion that a customer wishes to participate in 'a massive fraud in order to further its relationship with a company it knows to be insolvent is not plausible." *Krys v. Pigott*, 749 F.3d 117, 132 (2d Cir. 2014).

[12] The other cases cited by the Insurers offer no support. In *Zirkin v. Quanta Capital Holdings Ltd.*, No. 07-cv-851 (RPP), 2009 WL 185940 (S.D.N.Y. Jan. 23, 2009), the alleged motive was found not to be sufficient to put forth a claim of fraudulent intent. *Glidepath Holding B.V. v. Spherion Corp.*, 590 F. Supp. 2d 435, 455 (S.D.N.Y. 2007) merely stands for the irrelevant point that motive may be found where one lies to another to induce a sale to that individual.

[13] As a threshold matter, *Loreley* did not examine whether the substantive scienter requirement under New York law had been met. *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 177 n.10. (2d Cir. 2015).

internal valuations that contradicted the ones Lincoln issued to Beechwood. The Insurers cite one paragraph from the Complaint (Opp. 10; Compl. ¶729), which alleges that Lincoln valued an investment using an income statement but without a balance sheet and that Beechwood underwrote loans without financial information. Yet the absence of certain supporting documents (with no allegations about what Lincoln relied on) is a far cry from a fraudulent valuation, not least because Lincoln said it assumed the accuracy of Beechwood's information.[14] The ultimate failures of Beechwood cannot be transferred to Lincoln, no matter how much the Insurers seek to hold Lincoln responsible for actions of others.

4. The Insurers Cannot Establish Causation

The allegations here preclude a plausible claim that Lincoln's actions caused the Insurers' loss. (*See* Br. 19-20.) They offer no authority to suggest otherwise and instead contend that they continued their relationship with Beechwood well after Lincoln terminated its engagement "because of the misrepresentations and omissions in Lincoln's reports." (Opp. 17.) Not only is this allegation notably absent from the Complaint, it makes no sense given that another valuation firm fulfilled the reporting requirements of the Reinsurance Agreements for a year and a half after Lincoln's exit, at a time when the alleged fraud developed and eventually unraveled. (Compl. ¶677.)[15] The Insurers cannot disguise this causal gap by failing to address it in their

[14] Moreover, the Insurers misread two internal emails among Lincoln analysts, including one that included a link to a *South Park* video, to mean that Lincoln knew Beechwood's investments were "bogus all along." (Opp. 10.) That is pure conjecture.

[15] The Insurers make much of the timing of the reduction in value of certain Beechwood investments in the Q4 Positive Assurance Valuation occurring after Beechwood provided information regarding Platinum's connection to several Beechwood investments in December 2014. (Opp. 16-17.) Lincoln's acknowledgement of that timing, as pled in the Complaint, is not a concession that Lincoln concealed information. As discussed above, the guarantees provided by Platinum (including those identified in the Complaint) were disclosed in the valuations.

Complaint (and by failing to sue the subsequent valuation firm).

5. The Insurers Do Not Adequately Allege a Special Relationship

The Insurers' argument that a "special relationship" existed with Lincoln rests on a faulty reading of the case law and does not counter the fact that Lincoln had no direct dealings with the Insurers, addressed its reports to Beechwood only, and expressly directed that its reports could not be relied on by anyone else. (Br. 7-8, 21.) The law is clear: a "special relationship" requires a party to demonstrate a relationship that is "so close as to approach that of privity, if not completely one with it." *Credit All. Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 550 (1985); *see also Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 114-15 (2d Cir. 2012). Insurers rely on *Bayerische Landesbank, New York Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42 (2nd Cir. 2012), yet the defendant in *Bayerische*, unlike Lincoln, met with the plaintiff at its offices and made specific representations to the plaintiff regarding the ways it would protect the plaintiff's interests. *Id.* at 60. The Insurers also try to distinguish the cases cited by Lincoln, claiming that Lincoln purportedly knew that the Insurers were relying on the valuations. Even if that allegation was well pleaded (it is not), that still would not create a "privity-like relationship," as required for a negligent misrepresentation claim. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 271 (2d Cir. 1993). Indeed, *Anschutz Corp.* cited the absence of "direct contact" as the deciding factor in dismissing a negligent misrepresentation claim. 690 F.3d 98, 115.

The Insurers are also wrong to suggest that the special relationship issue cannot be resolved on the pleadings, their reliance on *Suez Equity Inv'rs, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87 (2d Cir. 2001) notwithstanding. In *Suez Equity*, the defendants "appeared to possess—and held themselves out as possessing—special knowledge about the [investments]." 250 F.3d at 103. In contrast, Lincoln made clear in its valuations that it relied on information from Beechwood without independent verification. And the Insurers do not allege that Lincoln

had made any oral or written statements that would undermine these disclaimers, a key fact present in *Suez Equity*. *Id.* Courts will dismiss a claim for negligent misrepresentation if the pleadings contain insufficient allegations, as they do here. *See, e.g.*, *EBD Holdings v. Palmer Johnson Acquisition Corp.*, 387 F. Supp. 2d 265 (S.D.N.Y. 2004).

The Insurers attempt to bypass the special relationship requirement by asserting that the negligent misrepresentation claim survives because Lincoln "held itself out as a sophisticated financial services firm with specialized knowledge"[16] and "knew that the information it provided to Beechwood was . . . positively assuring [Insurers] that those investments were safe, reliable, and valuable."[17] (Opp. 19-20.) But these elements must be established in addition to, not in lieu of, the existence of a special relationship. *See Suez Equity*, 250 F.3d at 103.

B. The Insurers' Aiding and Abetting Claims Should Be Dismissed

1. The Insurers Cannot Plausibly Allege Actual Knowledge

The Insurers concede that Lincoln lacked knowledge of the Ponzi-esque scheme (a "red herring") and now assert that Lincoln "actually knew" its reports "fraudulently overvalu[ed]" Beechwood's investments because they "were the product of self-dealing." (Opp. 20.) They must claim actual knowledge because "[c]onstructive knowledge . . . is insufficient to sustain a claim for aiding and abetting fraud or breach of fiduciary duty." *Krys*, 749 F.3d at 131 (affirming *In re Refco Inc. Sec. Litig.*, No. 07 MDL 1902 (JSR) et seq., 2012 WL 3126834 (S.D.N.Y. July 20, 2012) (Rakoff, J.) (dismissing aiding and abetting claims for failing to plead facts supporting an

[16] The Insurers cite paragraph 753 of the Complaint in support, but it does not state that *Lincoln* held itself out as "sophisticated" or having "specialized knowledge."

[17] None of the valuations issued by Lincoln stated that Beechwood's investments were "safe, reliable, and valuable." Rather, the valuations each stated whether Beechwood's valuation of its investments was reasonable or not unreasonable based on the information provided to Lincoln by Beechwood. (*See* Flath Decl., Exs. B-M.)

inference of actual knowledge)).

The Insurers' contentions rely on vague accusations without particularized facts. They assure the Court that Lincoln's knowledge of the fraud may be found in certain paragraphs of their Complaint, (Opp. 21 (citing Compl. ¶¶707, 752-59)), but those paragraphs allege Lincoln knew that: (i) Beechwood and Platinum "were affiliated," (ii) Beechwood would make "risky, illiquid investments," (iii) Lincoln was to provide "independent third-party valuations" of those investments, and (iv) Lincoln "knew" that the Insurers would rely on the reports. Nowhere in those paragraphs or elsewhere do the Insurers proffer particularized allegations that Lincoln knew the investments were secretly controlled by Platinum, much less that Lincoln had actual knowledge of the underlying fraud.[18]

Although the Insurers disavow reliance on a forbidden "red flags" theory, that is all they can point to—that the alleged affiliation of Platinum and Beechwood and challenges in obtaining supporting documentation about the investments should have tipped Lincoln off to self-dealing and misappropriation. This amounts to the type of "vague suspicions" that courts routinely dismiss as "far removed from reckless disregard, let alone actual knowledge." *In re Refco*, 2012 WL 3126834, at *1-2 (Rakoff, J.). Indeed, the facts of *Krys* highlight the high bar for actual knowledge: even an email from the purported aider and abettor to the primary violator regarding "concerns" about certain transactions and a later refusal to enter the transactions "on the basis that they were potential vehicles for fraud" did not support an inference that the defendant "actually knew that the fraud was, in fact, occurring." 749 F.3d at 132-33.

[18] The Insurers mischaracterize their own Complaint yet again in the next sentence when they declare that "Lincoln also knew that the purpose of the fraud was to create a permanent source of capital for Platinum." (Opp. 21 (citing Compl. ¶¶692-706).) That allegation is not found in those paragraphs.

2. The Insurers Cannot Establish Substantial Assistance

The Insurers suggest that the preparation of valuations for Beechwood itself constitutes substantial assistance in the fraud. (Opp. 22.) But the cases they cite make clear that more is required. In *Nathel v. Siegal*, 592 F. Supp. 2d 452, 470 (S.D.N.Y 2008), the defendants not only misrepresented their expertise, but also knowingly agreed to be presented as experts in order to make a fraudulent scheme appear legitimate. Likewise, in *King Cty. v. IKB Deutsche Industriebank AG*, 751 F. Supp. 2d 652, 655 (S.D.N.Y. 2010), Morgan Stanley allegedly "designed, structured, marketed, and maintained" an overvalued structured investment vehicle, created the "core deal documents," and itself "disseminated the false and misleading ratings" to potential investors. *Id*. at 665.

Finally, the Insurers fail to set forth anything more than conclusory allegations that Lincoln's actions were the proximate cause of their loss. The Insurers assert that they are raising "a theory akin" to that in *SPV OSUS Ltd. v. AIA LLC*, No. 15-cv-619 (JSR), 2016 WL 3039192 (S.D.N.Y. May 24, 2016) (Rakoff, J.). But the argument in *SPV*—that the defendant's actions prolonged the Ponzi scheme—was soundly rejected as a "textbook" example of "woefully deficient" pleading. *Id.* Although the Insurers try to distinguish *SPV*, citing their purported reliance on Lincoln's valuations, they cannot overcome the non-reliance admonition and the Insurers' continued investment in Beechwood long after Lincoln ceased providing valuation reports, a causal gap left unaddressed in the Complaint.

C. The Insurers' Unjust Enrichment Claim Should Be Dismissed

A claim for unjust enrichment "will not be supported if the connection between the parties is too attenuated" or if "the pleadings fail[ ] to indicate a relationship between the parties that could have caused reliance or inducement." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (affirming dismissal of an unjust enrichment claim where there was no

direct relationship); *see also GeigTech E. Bay LLC v. Lutron Elecs. Co.*, 352 F. Supp. 3d 265, 286 (S.D.N.Y. 2018) (dismissing an unjust enrichment claim where there were no allegations that a party "performed services" that would have created a relationship between the parties).

The Insurers have not satisfied these requirements. They have not, and cannot, allege that Lincoln performed services for the Insurers that would have created a relationship or connection between them. Lincoln's engagement letter with Beechwood restricted its services to Beechwood and Beechwood alone, (Compl. ¶702), and the reports reaffirmed that fact. (Flath Decl., Ex. C at 6.) Given the attenuated connection between the parties, the Insurers have not met the threshold elements necessary to plead a claim for unjust enrichment and this claim merits dismissal.

D. The Insurers' Civil Conspiracy Claim Must Be Dismissed

The Insurers have failed to allege viable tort claims, therefore their civil conspiracy claim must also be dismissed. (Br. 21-22.)

E. Amendment Would Be Futile

As the Insurers admit, the PSLRA applies to "[most] of the claims here," (Opp. 25), and the Insurers "have had access to copious discovery." *See In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 939 F. Supp. 2d 360, 391-92 & n.241 (S.D.N.Y. 2013) (citations omitted). The Insurers cannot find support in *Sky Med. Supply Inc. v. SCS Support Claims Servs., Inc.*, 17 F. Supp. 3d 207, 237 (E.D.N.Y. 2014), because they have made no suggestion of what an amendment would entail, and the Complaint is not otherwise well-pleaded.

III. CONCLUSION

For these reasons, all Counts against Lincoln should be dismissed with prejudice.[19]

[19] Because the entirety of the Insurers' Complaint should be dismissed, the Insurers are not entitled to contribution or indemnity.

Dated: June 28, 2019

Chicago, Illinois

Respectfully submitted,

/s/ William E. Ridgway

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CERTIFICATE OF SERVICE

I hereby certify that, on June 28, 2019, I served the foregoing Third-Party Defendant Lincoln International LLC's Reply in Support of Its Motion to Dismiss the Third-Party Complaint via the Court's electronic filing system on all attorneys of record who have entered an appearance by ECF in this proceeding.

/s/ William E. Ridgway
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