UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA,	:	
Plaintiff,	:	Master Case No. 1:18-cv-06658 (JSR)
v.	:	
	:	Case No. 1:19-cv-07137 (JSR)
LINCOLN INTERNATIONAL LLC and LINCOLN PARTNERS ADVISORS LLC,	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Defendants Lincoln International LLC and Lincoln Partners Advisors LLC (together, "Lincoln") submit this Memorandum of Law in Support of their Motion to Dismiss the Amended Complaint ("Amended Complaint") of Plaintiff Senior Health Insurance Company of Pennsylvania ("SHIP").[1]

PRELIMINARY STATEMENT

SHIP has acknowledged that its prior complaint against Lincoln lacked evidentiary support because SHIP neither received nor reviewed Lincoln's valuation reports and therefore could not have possibly relied upon those reports. Yet in an attempt to keep its threadbare claims against Lincoln alive, SHIP has filed an Amended Complaint that again makes implausible and unsupported allegations regarding SHIP's purported receipt of and reliance on alleged valuation "marks" from Lincoln.

SHIP's second attempt to plead claims against Lincoln, however, suffers from many of the same defects as before. While SHIP was forced to abandon its fraud claims, SHIP again asserts aiding and abetting fraud and breach of fiduciary duty and conspiracy claims, doubling down on its theory that "Beechwood used Lincoln's valuation reports to induce SHIP to authorize the payment of 'performance fees' to Beechwood" under the Investment Management Agreements ("IMAs"). (Dkt. No. 39 ¶ 193.) But whether cast as fraud or aiding and abetting and conspiracy, SHIP's Amended Complaint fails to state a viable claim against Lincoln. Indeed, despite having engaged in extensive document discovery with Lincoln, when SHIP's 75-page Amended Complaint is distilled down to the pertinent facts, it is clear that SHIP has no plausible allegations supporting its claim that Lincoln's valuation reports aided Beechwood's purported

[1] All docket numbers refer to entries in Case No. 1:19-cv-07137, unless otherwise noted.

fraud or caused SHIP damages. Accordingly, dismissal of SHIP's aiding and abetting and conspiracy claims is warranted.

SHIP's Amended Complaint, which still largely mimics the third-party complaint of Bankers Conseco Life Insurance Company and Washington National Insurance Company (together, "CNO") (No. 18-cv-12018, Dkt. No. 75), also fails to cure the flaws that led this Court to dismiss claims against Lincoln for contribution and indemnity (Count Four) and unjust enrichment/constructive trust (Count Five), making dismissal warranted.

SHIP knew that its Amended Complaint would be challenged, and that its claims were subject to Federal Rule of Civil Procedure 9(b)'s heightened pleading requirements. In light of SHIP's multiple failed attempts to state claims against Lincoln, another opportunity to fix its pleading errors would be futile and its claims should be dismissed with prejudice.

BACKGROUND

The Court is undoubtedly familiar with the facts regarding the relationship between SHIP and the Beechwood entities, as well as Beechwood's engagement of Lincoln. In short, between 2014 and 2015, SHIP entered into three IMAs with Beechwood: the BBIL IMA on May 22, 2014, the Beechwood Re IMA on June 13, 2014, and the BAM IMA on January 15, 2015. (Dkt. No. 39 ¶¶ 60-61, 69.) Before entering into the first IMA, on April 10, 2014, Beechwood sent SHIP information regarding its asset management capabilities and strategies. (*Id.* ¶ 48.) Beechwood allegedly emphasized its relationship with Lincoln, which began on February 19, 2014. (*Id.* ¶¶ 49, 88.) SHIP does not allege that Lincoln provided materials, participated in, or was even aware of Beechwood's pitch to SHIP.

Although the IMAs required Beechwood to provide SHIP quarterly valuations, during Lincoln's short engagement with Beechwood, SHIP never received or reviewed a single Lincoln valuation. (*Id.* ¶ 58.) Indeed, Lincoln did not issue a report valuing any of SHIP's investments

until January 15, 2015, when it issued its last Quarterly Portfolio Review that valued Beechwood's investments as of December 31, 2014. (*Id.* ¶ 101; Ex. A.) On February 19, 2015, Lincoln issued a negative assurance letter, valuing a handful of SHIP's investments as of January 30, 2015. (Dkt. No. 39 ¶ 101; Ex. B.) Lincoln terminated its engagement with Beechwood on that same day (Dkt. No. 39 ¶ 169), and Beechwood subsequently used Duff & Phelps to value SHIP's investments.[2]

The IMAs entitled Beechwood to be paid "performance fees" if the assets in the IMA accounts exceeded certain contractual thresholds. (*Id.* ¶¶ 63, 76.) Beechwood authorized payment of "performance fees" to Beechwood under the IMAs on nineteen occasions. (No. 18-cv-06658, Dkt. No. 374 ¶ 345.) All but one of the performance fee withdrawals occurred *after* Lincoln terminated its engagement—*i.e.*, during a time when Beechwood was using a different valuation provider. (Dkt. No. 39 ¶¶ 65, 68, 77.) In particular, as set forth below, all performance fee withdrawals under the BBIL IMA occurred after Lincoln terminated its engagement:

Date of Fee Withdrawal	**Amount Wrongfully Taken from Trust Account**	**Purported Time Period Covered by Wrongful Withdrawal**
October 2, 2015	$500,000	Period ending on September 30, 2015
December 2, 2015	$225,000	Period ending on November 30, 2015
February 9, 2016	$500,000	Period ending on January 31, 2016
August 2, 2016	$11,118,981	Period ending on July 31, 2016

[2] *See Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 522 (S.D.N.Y. 2018) ("SHIP points to an April 9, 2015 Duff & Phelps report that Elliot Feit at Beechwood emailed SHIP's then-CFO on April 20, 2015. SHIP alleges that this report significantly overstated the value of certain Platinum-related assets that Beechwood had purchased with SHIP funds." (internal citation omitted)).

(No. 18-cv-06658, Dkt. No. 374 ¶ 358.) Likewise, every performance fee withdrawal under the BAM IMA occurred after Lincoln terminated its engagement with Beechwood:

Date of Fee Withdrawal	Amount Wrongfully Taken from Trust Account	Purported Time Period Covered by Wrongful Withdrawal
April 6, 2015	$3,500,000	Period ending on March 31, 2015
July 22, 2015	$4,500,000	Period ending on June 30, 2015
December 2, 2015	$750,000	Period ending on November 30, 2015
February 9, 2016	$600,000	Period ending on January 31, 2016
March 22, 2016	$400,000	Period ending on February 29, 2016
July 7, 2016	$1,600,000	Period ending on June 30, 2016

(*Id.* ¶ 345.) As to the withdrawals that occurred under the Beechwood Re IMA, only one occurred during Lincoln's engagement (October 2, 2014) and covered the time period *before* Lincoln began valuing SHIP's investments:

Date of Fee Withdrawal	Amount Wrongfully Taken from Trust Account	Purported Time Period Covered by Withdrawal
October 2, 2014	$1,000,000	Period ending on September 30, 2014
July 17, 2015	$2,100,000	Period ending on June 30, 2015
September 2, 2015	$600,000	Period ending on August 31, 2015
October 20, 2015	$600,000	Period ending on September 30, 2015
November 13, 2015	$400,000	Period ending on October 31, 2015
December 2, 2015	$825,000	Period ending on November 30, 2015
April 4, 2016	$3,000,000	Period ending on March 31, 2016
May 26, 2016	$750,000	Period ending on April 30, 2016

(*Id.* ¶ 354.) SHIP therefore could not have possibly relied on Lincoln's valuations in approving Beechwood's performance fees.

ARGUMENT

I. SHIP's Aiding and Abetting and Conspiracy Claims Differ from CNO's in Material Ways, and Dismissal is Warranted

A. SHIP Fails to Properly Plead its Aiding and Abetting Claims

SHIP's Amended Complaint does not cure the deficiencies Lincoln previously identified regarding SHIP's aiding and abetting claims (Counts One and Two). To state a claim for aiding and abetting, SHIP must allege "the existence of a primary violation, actual knowledge of the violation on the part of the [alleged] aider and abettor, and substantial assistance." *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 533 (S.D.N.Y. 2009). Aiding and abetting claims that are based on a fraud—even if pleaded as aiding and abetting a breach of fiduciary duty—are subject to Rule 9(b)'s pleading requirements. *See Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 245 (S.D.N.Y. 1996) (applying Rule 9(b) to aiding and abetting breach of fiduciary duty claim). As SHIP has recognized,[3] these pleading requirements are more strictly enforced in aiding and abetting claims. *See Nat'l Westminster Bank USA v. Weksel*, 511 N.Y.S.2d 626, 630 (N.Y. App. Div. 1987) ("Where liability for fraud is to be extended beyond the principal actors, . . . it is especially important that the command of [New York's particularity requirement] be strictly adhered to.").

SHIP has again failed to state an aiding and abetting claim against Lincoln. Unlike CNO, SHIP did not receive or review Lincoln's valuation reports, and SHIP therefore cannot plausibly allege that Lincoln's valuation reports substantially assisted Beechwood's fraud or caused SHIP's damages. SHIP's Amended Complaint also falls well short of plausibly suggesting

[3] (*See* No. 18-cv-12018, Dkt. 157 at 20.)

Lincoln knew about the alleged fraudulent scheme. Accordingly, dismissal of both aiding and abetting claims is warranted.

1. SHIP Fails to Plausibly Allege that Lincoln Provided Substantial Assistance to the Alleged Fraud

SHIP does not plausibly allege that Lincoln's valuation reports—which SHIP neither received nor reviewed—substantially assisted Beechwood's purported fraud. To establish an aiding and abetting claim, SHIP must plausibly plead that Lincoln substantially assisted the primary wrongdoer (Beechwood) by "affirmatively assist[ing], help[ing] conceal or fail[ing] to act when required to do so, thereby enabling the breach to occur." *SPV OSUS Ltd. v. AIA LLC*, No. 15-cv-619 (JSR), 2016 WL 3039192, at *6 (S.D.N.Y. May 24, 2016). Assistance is substantial only where "the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated." *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 470 (S.D.N.Y. 2001). Merely alleging "but-for" causation is not enough: "aider and abettor liability requires the injury to be a direct or reasonably foreseeable result of the conduct." *Id.* Moreover, "where a defendant owes no direct fiduciary duty to the plaintiff, mere inaction cannot constitute substantial assistance." *SPV OSUS*, 2016 WL 3039192 at *6.

Critically, SHIP does not allege—nor could it—that Lincoln made any misrepresentations to SHIP or that SHIP received or reviewed purported misrepresentations in Lincoln's valuation reports. *See SPV OSUS*, 2016 WL 3039192 at *6-8 (dismissing aiding and abetting claims where plaintiff did not plead that it "had any dealings whatsoever" with defendants). Instead, SHIP claims that it received Lincoln's valuation "marks" in two ways. First, SHIP claims that "Beechwood sent SHIP spreadsheets listing the prices of SHIP's assets that were managed by Beechwood and indicating that Lincoln was the price source for those assets." (Dkt. No. 39 ¶ 138.) SHIP alleges only one instance in which this purportedly

occurred—on October 14, 2014, Beechwood sent SHIP a spreadsheet identifying Lincoln as the "price source" for two investments (Agera Energy and Platinum Partners Value Arbitrage) for the period ending September 30, 2014. (*Id.* ¶ 139; *see also* Ex. C at 4-6.) Notably, SHIP does not allege that Lincoln assisted Beechwood in preparing this spreadsheet or that Lincoln even valued SHIP's investments in Agera Energy and Platinum Partners Value Arbitrage as of September 30, 2014. In fact, there is no allegation, let alone evidence, that Lincoln valued *any* of SHIP's investments as of September 30, 2014. The fact that Beechwood transmitted a spreadsheet that identified Lincoln—and another entity—as a "price source" for certain investments surely cannot constitute substantial assistance by Lincoln.

Second, SHIP alleges that Beechwood "sent Lincoln's valuations to Wilmington Trust," and Wilmington Trust purportedly used those valuation reports "to mark positions for Beechwood's investment management clients," including SHIP. (Dkt. No. 39 ¶ 144.) Again, SHIP alleges only one instance in which this purportedly occurred—on March 7, 2014, Beechwood allegedly sent Wilmington Trust a Lincoln valuation report as of February 28, 2014, and instructed Wilmington to update its positions. (*Id.*) SHIP, however, fails to acknowledge that this occurred more than two months *prior* to SHIP entering into its first IMA with Beechwood. This allegation thus does nothing to support SHIP's conclusory allegation that Lincoln substantially assisted Beechwood's purported fraud against SHIP.

SHIP's allegations that Lincoln failed to disclose purportedly pertinent information to SHIP, (*see, e.g.*, Dkt. No. 39 ¶¶ 4, 7, 67, 172, 188), fare no better. Failure to reveal allegedly material information "cannot support a claim for aiding and abetting where, as here, [defendant] owed no fiduciary duty directly to plaintiff." *SPV OSUS Ltd.*, 2016 WL 3039192, at *8. SHIP does not allege, nor could it, that Lincoln owed a fiduciary duty to SHIP. As such, Lincoln's

purported failure to disclose information in its valuation reports (which SHIP never received nor reviewed), cannot form the basis of an aiding and abetting claim.

2. SHIP Fails to Plausibly Allege that Lincoln's Valuations Caused SHIP's Damages

SHIP's causation theory is fundamentally flawed and relies on unsupported allegations, making dismissal appropriate. SHIP generally alleges that "Beechwood used Lincoln's valuation reports to induce SHIP to authorize the payment of 'performance fees' to Beechwood under the IMAs, even though such fees had not actually been earned." (Dkt. No. 39 ¶ 193.) SHIP provides a single example—alleging that on or around April 6, 2015, SHIP authorized a performance fee withdrawal of $3.5 million from the BAM IMA based on a purported market value of $115,143,472.39 as of March 31, 2015. (*Id.* ¶¶ 194-95.) SHIP further alleges that the valuation of these assets as of March 31, 2015, were "calculated by or through Beechwood and Lincoln, which reported them to Wilmington Trust to include in its account statements." (*Id.* ¶ 196.) This allegation is not plausibly pled or supported by the evidence. Lincoln terminated its engagement with Beechwood in February 2015 (*id.* ¶ 169), and last valued SHIP's investments as of January 30, 2015 (*id.* ¶ 101; Ex. B).[4] Indeed, SHIP completely ignores the fact that another valuation firm—Duff & Phelps—valued SHIP's investments as of March 31, 2015, and therefore Lincoln could not be the source of the purportedly inflated March 31, 2015, values.

SHIP further alleges that "Beechwood engaged in a similar pattern of conduct with respect to the withdrawal of performance fees over the period that Lincoln provided valuations under the Beechwood Re IMA, requesting withdrawal of at least $3,100,000, and under the

[4] Notably, in that valuation, Lincoln valued only *one* investment in the BAM IMA, and that investment was valued at $791,978 (Ex. B at 2), far less than the $115 million market value on March 31, 2015, that formed the basis of the $3.5 million performance fee withdrawal.

BBIL IMA, requesting withdrawal of at least $500,000." (Dkt. No. 39 ¶ 198.) Again, SHIP's allegations are neither plausible nor supported by the evidence. In fact, SHIP's allegations—both in this Amended Complaint and its third-party complaint—reveal that all but one performance fee occurred well *after* Lincoln terminated its relationship with Beechwood and was replaced with another valuation firm. (*See id.* ¶ 65 (BBIL IMA fee withdrawals occurred from September 2015 to July 2016); No. 18-cv-06658, Dkt. No. 374 ¶ 352 (Beechwood Re IMA fee withdrawals occurred on October 2, 2014, and from July 2015 to May 2016); Dkt. No. 39 ¶ 77 (BAM IMA fee withdrawals occurred from March 2015 to July 2016).) As for the one performance fee withdrawal of $1,000,000 that occurred during Lincoln's engagement with Beechwood (on or around October 2, 2014) (No. 18-cv-06658, Dkt. No. 374 ¶ 352), SHIP cannot tie that withdrawal to Lincoln's valuation reports. Indeed, as discussed above, that performance fee was authorized *prior* to Lincoln valuing SHIP's investments.

SHIP has not and cannot plausibly alleged a single instance in which Lincoln's purported overvaluation of a SHIP investment caused SHIP to authorize a performance fee withdrawal. Dismissal is therefore warranted. *See SPV OSUS*, 2016 WL 3039192, at *6 (dismissing plaintiffs' claim that defendants substantially assisted a Ponzi scheme by providing the cover that allowed the scheme to continue to operate as a "textbook example of a 'but-for' theory of causation masquerading as a theory of proximate causation"); *Cromer Fin. Ltd.*, 137 F. Supp. 2d at 472 (substantial assistance inadequately alleged because, "[w]hile the Ponzi scheme may only have been possible because of [the defendant's] actions, or inaction, [the defendant's] conduct was not a proximate cause of the Ponzi scheme").

3. SHIP Fails to Allege that Lincoln Had Actual Knowledge of the Fraud

While SHIP broadly alleges that Lincoln knew that SHIP was receiving and relying on its valuation marks, SHIP pleads no facts that plausibly suggest that Lincoln had "actual

knowledge" of the alleged scheme to defraud SHIP. *See Renner v. Chase Manhattan Bank, N.A.*, 85 F. App'x 782, 784 (2d Cir. 2004). SHIP cannot "merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known" of the underlying fraud. *Banco Indus. de Venez., C.A. v. CDW Direct, L.L.C.*, 888 F. Supp. 2d 508, 514 (S.D.N.Y. 2012) (citations omitted). Rather, SHIP "must allege facts that give rise to a 'strong inference' of fraudulent intent." *Rosner v. Bank of China*, No. 06 CV 13562, 2008 WL 5416380, at *4 (S.D.N.Y. Dec. 18, 2008). SHIP has not done that here.

Nor does SHIP plausibly allege that Lincoln knew its valuations were false. Even if one regards the Complaint as identifying "red flags" for Lincoln, allegations that Lincoln should have been able to deduce the fraud on the basis of red flags is not a substitute for actual knowledge. *See In re Refco Inc. Sec. Litig.*, No. 07 MDL 1902(JSR), 2012 WL 3126834, at *3 (S.D.N.Y. July 30, 2012) ("Vague suspicions are far removed from reckless disregard, let alone actual knowledge."); *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2d Cir. 2006) (holding that alleged "'red flags' . . . were insufficient to establish a claim for aiding and abetting fraud because, although they may have put the banks on notice that some impropriety may have been taking place, those alleged facts do not create a strong inference of actual knowledge of [the attorney's] outright theft of client funds.").

B. SHIP Fails to Properly Plead its Conspiracy Claim

The Amended Complaint does not cure the deficiencies Lincoln previously identified regarding SHIP's conspiracy claim (Count Three). To sustain a civil conspiracy claim, SHIP must allege an underlying tort and must set forth plausible facts indicating: (i) a corrupt agreement between Lincoln and Beechwood, (ii) an overt act committed by Lincoln in furtherance of that agreement, and (iii) resulting injury. *See Senior Health Ins. Co. of Pa. v. Beechwood Re Ltd.*, 345 F. Supp. 3d 515, 531 (S.D.N.Y. 2018).

Even if SHIP adequately pled underlying torts for fraudulent inducement and breach of fiduciary duty, it cannot plausibly plead facts that connect Lincoln to those torts. SHIP's conspiracy claim based on purportedly fraudulent valuations likewise fails because: (i) SHIP has failed to allege that any overt act by Lincoln caused injury to SHIP; (ii) SHIP has failed to adequately plead a corrupt agreement between Lincoln and Beechwood; and (iii) the allegations supporting SHIP's conspiracy claim are identical to those supporting its aiding and abetting claims, and therefore SHIP's conspiracy claim should be dismissed as duplicative.

1. SHIP's Conspiracy Claim Based on Fraudulent Inducement and Breach of Fiduciary Duty Fails

SHIP cannot connect Lincoln to its underlying claims against Beechwood for fraudulent inducement and breach of fiduciary duty. As for its fraudulent inducement theory, SHIP fails to set forth any allegations that Lincoln conspired with Beechwood to induce SHIP to enter into the IMAs. Indeed, the Complaint's section detailing SHIP's decision to enter into the IMAs—which is tellingly titled "Beechwood's Misrepresentations to Induce SHIP to Enter Into the IMAs"—relates solely to actions taken by Beechwood. (Dkt. No. 39 ¶¶ 47-54.) The allegation that Beechwood cited Lincoln's valuation work to persuade SHIP to enter into the IMAs falls far short of establishing that Lincoln conspired with Beechwood. *See Jacquemyns v. Spartan Mullen Et Cie, S.A.*, No. 10 Civ. 1586 (CM)(FM), 2011 WL 348452, at *7 (S.D.N.Y. Feb. 1, 2011) (dismissing claim that defendants conspired to fraudulently induce plaintiffs to invest where there were no alleged facts indicative of an agreement among defendants to fraudulently induce).

SHIP's conspiracy to breach a fiduciary duty claim is likewise untenable, as SHIP previously conceded when it *withdrew* that claim in response to Lincoln's prior motion to dismiss. (Dkt. No. 36 at 15 n.6 ("To the extent Count II alleges a conspiracy to commit a breach of fiduciary duty, any such allegation is withdrawn.").) To sustain this claim, "all members of the

alleged conspiracy must independently owe a fiduciary duty to the plaintiff." *Senior Health Ins. Co. of Pa.*, 345 F. Supp. 3d at 531 (citation omitted). The Amended Complaint contains no facts suggesting that Lincoln owed a fiduciary duty to SHIP. Regardless, SHIP's concession alone warrants dismissal. *See Stalter v. Cty. of Orange*, No. 15-cv-5274 (NSR), 2016 WL 8711397, at *5 n.2 (S.D.N.Y. Aug. 5, 2016) ("Courts permit parties to withdraw claims via responses to a motion to dismiss. Therefore, the Court dismisses the [withdrawn] claim.").

2. SHIP Fails to Allege an Injury Caused by Lincoln

As discussed above, SHIP fails to allege that Lincoln's "overt acts" caused SHIP's damages. Under New York law, the injury for which plaintiff may be entitled to recovery is not the conspiracy itself but the damage caused by specific overt acts. *Medtech Prods. Inc. v. Ranir, LLC*, 596 F. Supp. 2d 778, 794-95 (S.D.N.Y. 2008) (quoting *Grove Press, Inc. v. Angleton*, 649 F.2d 121, 123 (2d Cir. 1981)); *Britestarr Homes, Inc. v. Piper Rudnick LLP*, 453 F. Supp. 2d 521, 528 (D. Conn. 2006) ("Under New York law, claims of . . . civil conspiracy . . . include[s] as an essential element: damages caused by the alleged tort."). Here, the only alleged "overt act" on Lincoln's part is its issuance of two valuation reports for SHIP's investments—a January 19, 2015 Quarterly Portfolio Review (valued investments as of December 31, 2014), and a February 19, 2015 Negative Assurance (valued investments as of January 31, 2015). (Dkt. No. 39 ¶ 102.) Yet SHIP has not plausibly alleged a single instance in which either of those valuation reports caused SHIP injury. *See supra*, Section I.A.2. That failure dooms SHIP's civil conspiracy claim. *See Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 299 (S.D.N.Y. 2000) (dismissing civil conspiracy because, among other reasons, "plaintiff [had] not alleged any direct connection between [defendant] and the allegedly fraudulent representations that caused [plaintiff's injury]").

3. SHIP Fails to Allege a Corrupt Agreement

SHIP also fails to adequately plead a corrupt agreement between Lincoln and Beechwood. A proper allegation of civil conspiracy must set forth particularized facts showing a "conscious agreement among the defendants." *Odyssey Re (London) Ltd.*, 85 F. Supp. 2d at 297 (citation omitted). The Amended Complaint lacks facts indicating that Lincoln rendered its valuation reports to further a corrupt scheme. Merely alleging a profit motive or a desire on Lincoln's part to appease its client is insufficient to establish a corrupt agreement. *See Heinert v. Bank of Am., N.A.*, 19-CV-6081L, 2019 WL 5287950, at *6 (W.D.N.Y. Oct. 18, 2019) ("To the extent that plaintiffs have alleged that [defendant] engaged in overt acts which assisted the conspiracy, plaintiffs have not alleged that [defendant] did so due to any specific, knowing agreement with the individual defendants, or that she acted in order to further such an agreement (rather than simply to assist her clients, preserve a relationship with them, and/or enrich herself)."). Dismissal of SHIP's conspiracy claim is therefore warranted.

4. SHIP's Civil Conspiracy Claim is Duplicative

Finally, the allegations supporting SHIP's conspiracy claim are identical to those supporting its aiding and abetting claims, and therefore SHIP's conspiracy claim should be dismissed as duplicative. In support of its civil conspiracy claim, SHIP claims that Lincoln misrepresented the nature and performance of SHIP's investments—the exact allegation SHIP cites in support of its aiding and abetting claims. (*See* Dkt. No. 39 ¶¶ 225-33.) SHIP's failure to offer additional facts in support of its conspiracy claim warrants dismissal of that claim. (No. 18-cv-06658, Dkt. No. 654 at 149 ("[T]he civil conspiracy claims are largely duplicative of the aiding and abetting claims. Therefore, if the aiding and abetting claims are not dismissed for a given defendant, the civil conspiracy claim against that defendant should be dismissed.").)

II. SHIP's Contribution and Indemnity and Unjust Enrichment/Constructive Trust Claims Are Nearly Identical to Claims This Court Has Already Dismissed

SHIP merely copies from CNO's third-party complaint the factual allegations that this Court found insufficient to support claims of contribution and indemnity and unjust enrichment/constructive trust (Counts Four and Five). (*See id.*) SHIP's Complaint adds no allegations that would give grounds for disturbing the Court's prior decision.

As with CNO, SHIP fails to adequately plead a "special relationship" of trust between SHIP and Lincoln, a necessary element of claims for contribution and indemnity and unjust enrichment/constructive trust. *See, e.g., Overton v. Todman & Co.*, No. 05 Civ. 7956(DAB), 2009 WL 3154307, at *3-4 (S.D.N.Y. Sept. 24, 2009); *GeigTech E. Bay LLC v. Lutron Elecs. Co.*, 352 F. Supp. 3d 265, 286 (S.D.N.Y. 2018). A "special relationship" requires "actual privity of contract between the parties or a relationship so close as to approach that of privity." *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 114 (2d Cir. 2012) (citations omitted).

On that point, SHIP's Amended Complaint contains no additional facts beyond those CNO alleged. Like CNO, SHIP is unable to assert contractual privity, and SHIP makes no attempt to plead a special relationship between Lincoln and SHIP. To the extent that SHIP tries to argue that Lincoln purportedly knew that it was valuing SHIP's assets and that SHIP was relying on Lincoln's valuation marks, (*see, e.g.*, Dkt. No. 39 ¶ 137), that would not give rise to a "special relationship." *See Antidote Int'l Films, Inc. v. Bloomsbury Publ'g, PLC*, 467 F. Supp. 2d 394, 402 (S.D.N.Y. 2006) ("[T]hat one party . . . knows the particular purpose to which the other party is putting material information supplied by the first party . . . does not . . . mandate[] a duty of care."). Indeed, the Court already rejected this argument in dismissing claims against Lincoln. (*See* No. 18-cv-06658, Dkt. No. 654 at 131 (concluding there was no special relationship where "Lincoln allegedly knew that WNIC and BCLIC relied upon Lincoln's reports").) As the Court

previously concluded, the "end and aim of [Lincoln's] engagement was to benefit Beechwood," not SHIP, and SHIP "does not allege that there was a direct contact between Lincoln and [SHIP] . . . [which] is an important factor in finding that no special relationship exists." (*Id.*) Accordingly, no special relationship exists between Lincoln and SHIP and dismissal of Counts Four and Five is warranted.

SHIP's unjust enrichment/constructive trust claim (Count Five) fails for an additional reason: Lincoln did not perform services for SHIP. *See GeigTech*, 352 F. Supp. 3d at 286 (requiring a special relationship *and* that the party "performed services . . . which caused . . . unjust enrichment" (citation omitted)). Lincoln was engaged by Beechwood, and Lincoln restricted its services to Beechwood and Beechwood alone. (*See* Ex. A.) This is fatal to SHIP's unjust enrichment claim, and dismissal is warranted.

III. SHIP's Claims Should Be Dismissed With Prejudice

SHIP's claims against Lincoln should be dismissed with prejudice. The Court already gave SHIP the opportunity to replead, and there is no set of facts that could cure these deficiencies. Moreover, given SHIP's undue delay throughout this litigation, (*see* Dkt. No. 24 at 5 ("[T]he Court still finds SHIP's conduct to be egregious.")), allowing it to replead would substantially prejudice Lincoln. *See Kulkarni v. City Univ. of N.Y.*, No. 01 Civ. 10628(DLC), 2003 WL 23319, at *5 (S.D.N.Y. Jan. 3, 2003) ("[Plaintiff] has demonstrated substantial undue delay throughout this litigation. Allowing him to replead his disparate impact claim would have substantially prejudiced defendants.").

CONCLUSION

Lincoln respectfully requests that SHIP's claims be dismissed with prejudice.

Dated: November 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on November 6, 2019, I served the foregoing Defendants' Memorandum of Law in Support of Their Motion to Dismiss Plaintiff's Amended 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 Ridgway
William Ridgway