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' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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It has been nearly 18 months since SHIP became a party to this litigation, and it has had the benefit of discovery from dozens of parties, including Lincoln, Beechwood, and Wilmington Trust. Yet still, SHIP fails to plausibly allege that the only two valuation reports Lincoln prepared valuing SHIP's investments, which SHIP never received or relied on, substantially assisted the alleged fraud or caused any purported damage to SHIP. SHIP's Opposition fails to grapple with the fact that: (1) the only performance fee SHIP approved during Lincoln's engagement with Beechwood happened *before* Lincoln valued any SHIP investment; and (2) every other performance fee was approved when Duff & Phelps was valuing SHIP's investments. Recognizing this deficiency, SHIP pivots to an entirely new causation theory—one notably absent from its Amended Complaint and unsupported by the documents on which SHIP relies.

SHIP also fails to provide any reason for this Court to depart from its previous order dismissing CNO's nearly identical claims for contribution and indemnity, and unjust enrichment/constructive trust. Dismissal of the Amended Complaint in its entirety is warranted.

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

A. SHIP Fails to Plausibly Allege that Lincoln Substantially Assisted Beechwood's Alleged Fraud

SHIP now acknowledges that Lincoln made no misrepresentations to SHIP and that SHIP neither received nor reviewed Lincoln's valuation reports. Dkt. No. 45 at 10. Nevertheless, SHIP claims to have pled substantial assistance in "painstaking detail" by alleging that (i) "Lincoln knowingly provided Beechwood with false valuations, knowing that Beechwood would communicate those valuations to its investors (including SHIP) who would rely on them," and (ii) SHIP received and relied on Lincoln's valuation "marks" from Beechwood and Wilmington Trust. *Id.* Yet, as set forth in Lincoln's opening brief, the only details that SHIP pleads regarding

its purported receipt of and reliance on Lincoln's valuation marks are implausible. *See* Dkt. No. 43 at 10-11. In particular, the spreadsheet purportedly sent by Beechwood identifying Lincoln as a "price source" for two investments was sent *before* Lincoln began valuing SHIP's investments. *Id.* And the only instance in which SHIP alleges that a Lincoln valuation report was sent to Wilmington Trust predates SHIP's investments with Beechwood. *Id.* at 11.

SHIP ignores these pleading deficiencies and instead relies on *Pension Committee of University of Montreal Pension Plan v. Bank of America Securities LLC*, 568 F.3d 374 (2d Cir. 2009). That case, however, highlights the shortcomings of SHIP's Amended Complaint. In *Pension Committee*, the plaintiff alleged that Bank of America Securities LLC ("BAS") not only knew that its allegedly false position reports were being provided to the fund's investors, auditors and administrators, but that BAS itself provided the auditors and administrators with direct access to the position reports, which were then used by the auditors and administrators to calculate the inflated NAV. In contrast, SHIP does not plausibly plead that the Lincoln valuation reports valuing SHIP's investments were provided to anyone other than its client Beechwood.

B. SHIP Fails to Allege Facts That Link Lincoln's Valuation Reports to SHIP's Purported Damages

SHIP does not dispute that all but one of the performance fee withdrawals occurred *after* Lincoln terminated its engagement with Beechwood when another valuation provider—Duff & Phelps—was valuing SHIP's investments. *See* Dkt. No. 43 at 12-13. Nor does SHIP dispute that the one performance fee withdrawal that took place during Lincoln's engagement occurred *prior* to the time that Lincoln valued SHIP's investments. *Id.* at 13. This timeline refutes SHIP's theory. Rather than address the problem, however, SHIP deflects and declares that "the manner in which Lincoln's valuations were (or were not) used in determining performance fees withdrawn from SHIP's account raises material questions of fact that cannot be decided at the

pleading stage." Dkt. No. 45 at 12. Not so. SHIP bears the burden of plausibly pleading proximate causation. Dkt. No. 43 at 13. SHIP approved each and every performance fee withdrawal, and should be able to plead what it relied on in doing so—the information is uniquely within SHIP's knowledge. Rule 9 does not permit SHIP to sidestep this flaw with an assurance that it can manufacture facts that do not exist today at some unspecified later date. That is not how Rule 9 works.

As a last resort, SHIP offers a half-baked theory that Lincoln's December 31, 2014 quarterly valuation "provided the 'baseline' net asset value used to calculate Beechwood's purported performance fees throughout 2015." Dkt. No. 45 at 13. As an initial matter, this theory appears nowhere in SHIP's Amended Complaint. SHIP cannot avoid dismissal by adding allegations in its Opposition. *See Mathie v. Goord*, 267 F. App'x 13, 14 (2d Cir. 2008) (summary order) (new claims presented in opposition to motion to dismiss could not be considered by district court). SHIP's theory is also contradicted by the very IMAs from which it selectively quotes. Under the IMAs, the baseline net asset value used to calculate the performance fees is the "net asset value of the Assets contributed to the Account as of the date of [the IMA]" (in other words, the amount of money contributed by SHIP), which is referred to as the "Initial NAV," or, in following years, "the value of the Account as of January 1 of each Year [which] will be the Initial NAV plus any accrued and unpaid Investment Return for such Year." Kushner Decl. Ex. A at 20-21. In other words, the "baseline" value is not the market value of the investments on January 1 as SHIP claims but rather the amount of money contributed by SHIP plus any accrued and unpaid investment return (which was set at 5.85% per annum). *Id.* Thus, SHIP cannot tie Lincoln's valuations to the performance fee withdrawals that took place in 2015.[1]

[1] SHIP's allegations about the "baseline" are also nonsensical. Even if Lincoln's purportedly *(cont'd)*

C. SHIP Fails to Adequately Plead Knowledge and Fraudulent Intent

Lincoln recognizes that this Court recently concluded that nearly identical allegations were sufficient to plead fraudulent intent and knowledge on Lincoln's part. *See* No. 18-cv-06658, Dkt. No. 654 at 129-32. Nevertheless, Lincoln's position remains that SHIP fails to allege facts: (1) showing Lincoln had a motive and opportunity to commit fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or recklessness. *See* Dkt. No. 43 at 13-14. Without these critical allegations, SHIP's aiding and abetting and conspiracy claims fail.[2]

II. SHIP Fails to Adequately Plead Conspiracy

The flaws in SHIP's aiding and abetting allegations doom its civil conspiracy claim as well.[3] As this Court has noted, a failure to plead the elements of an aiding and abetting claim generally renders a civil conspiracy claim implausible. *See* No. 18-cv-06658, Dkt. No. 654 at 150 ("[F]or the same reasons the substantial assistance or knowledge element is not adequately pled against a particular defendant, the 'intentional participation in furtherance of a plan' element [of a civil conspiracy claim] would also often fail."). Having presented no facts that would demonstrate if proven that Lincoln knew of or substantially assisted Beechwood's alleged fraud, SHIP cannot credibly claim that Lincoln participated in furtherance of that purported scheme.

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inflated valuations were used as the "baseline" value for calculating the 2015 performance fees, that would only *reduce* the performance fee that Beechwood would be entitled to take.

[2] SHIP contends it has adequately pled Lincoln's knowledge based on allegations of "conscious avoidance." *See* Dkt. 45 at 8-9. As the case cited by SHIP recognizes, however, "[p]lausibly alleging actual knowledge through conscious avoidance is a very high bar." *Vasquez v. Hong Kong & Shanghai Banking Corp. Ltd.*, No. 18-cv-1876, 2019 WL 2327810, at *16 (S.D.N.Y. May 30, 2019). SHIP's conclusory allegations fail to clear that bar.

[3] In its Opposition, SHIP withdrew for a second time its conspiracy to breach a fiduciary duty claim. *See* Dkt. No. 45 at 11 n.5.

Because SHIP offers no new allegations beyond those alleged in support of its aiding and abetting claims, its civil conspiracy claim must be dismissed. *See* Dkt. No. 43 at 17.

III. SHIP's Contribution and Indemnity and Unjust Enrichment/Constructive Trust Claims Are Nearly Identical to CNO's and Should Be Dismissed

SHIP provides no basis for this Court to depart from its prior ruling dismissing nearly identical contribution and indemnity and unjust enrichment claims against Lincoln. *See* No. 18-cv-06658, Dkt. No. 654 at 115-17, 130-31. SHIP, like CNO, fails to adequately plead a special relationship of trust and confidence between SHIP and Lincoln, a necessary element for both of these claims. *See* Dkt. No. 43 at 18-19. SHIP claims in response that Lincoln knew it would be valuing SHIP's assets and that SHIP was reviewing and relying on those valuation reports. Dkt. No. 45 at 16. Even if these allegations were true—which they are not—the Court already rejected this argument. *See* No. 18-cv-06658, Dkt. No. 654 at 131. As the Court 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.*

IV. SHIP's Claims Should Be Dismissed with Prejudice

Allowing SHIP another opportunity to replead would be futile and result in substantial prejudice to Lincoln. SHIP fails to explain how it could rectify the pleading deficiencies. Nor could it. And SHIP's contention that not allowing it to replead would result in SHIP being "treated worse than any other litigant in the consolidated actions," Dkt. No. 45 at 18, ignores the Court's prior rulings on this issue with respect to all parties. *See* No. 18-cv-06658, Dkt. No. 654 at 83 n.7 (explaining that dismissal was with prejudice because the parties, including SHIP, have "been in possession of relevant underlying documents for a substantial period of time"). SHIP's Amended Complaint should be dismissed with prejudice.

Dated: November 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on November 18, 2019, I served the foregoing Defendants' Reply 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
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