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Defendants Lincoln International LLC (“Lincoln International”) and Lincoln Partners Advisors LLC (“Lincoln Partners” or “Lincoln”) respectfully submit this memorandum of law in support of their motion for summary judgment on all remaining counts of the Amended Complaint of Plaintiff Senior Health Insurance Company of Pennsylvania (“SHIP”).

PRELIMINARY STATEMENT

SHIP claims to be the victim of a fraud perpetrated by Beechwood from 2014 through 2016, and that Lincoln aided and abetted that fraud by issuing two valuation reports in January and February 2015. Early on, SHIP maintained that it received those reports, but jettisoned that theory after realizing it was false. SHIP then survived a motion to dismiss on the theory that Wilmington Trust, the investment custodian, received and relied on the reports. Yet discovery reveals that to be wrong as well. The two valuation reports only went to Beechwood, the purported fraudster. Unable to attack the substance of a report it never saw, SHIP is left to pin its theory on the fair values that Lincoln opined on in those reports. In SHIP’s view, Lincoln willfully inflated the fair value marks it provided to Beechwood, who then communicated them to Wilmington Trust, which incorporated them into account statements that were then sent to SHIP. But undisputed evidence contradicts this latest theory, and it cannot in any event sustain aiding and abetting claims.

Measuring the “fair” value of illiquid investments, like those at issue here, is challenging and inexact, as courts recognize. Because there are no market prices or observable market inputs, the operative Accounting Standards Codification 820 (“ASC 820”) directs firms to rely on so-called “unobservable inputs,” such as an income analysis, which is precisely what Lincoln did here. Critically, SHIP has no evidence that Lincoln departed from the standards set forth in ASC 820, let alone that Lincoln knowingly overvalued any investment. Indeed, Lincoln disagreed with Beechwood and valued two of the seven investments significantly below par. Because Lincoln’s

fair value estimates were not unreasonable and adhered to ASC 820, its fair value marks for seven investments in early 2015 cannot have substantially assisted the purported fraud.

SHIP's aiding and abetting claims fail for three more reasons. First, issuing two valuation reports in a two-month period that were not sent to anyone other than the alleged fraudster cannot constitute substantial assistance of a multi-year fraud. Those reports were not even the source of the values that Beechwood sent to SHIP, via Wilmington Trust. In fact, Lincoln issued its valuation reports weeks after Wilmington Trust issued statements for the same period, and Lincoln valued several of the investments lower than the value assigned in the Wilmington Trust statements.

Second, Lincoln's valuation reports did not cause SHIP's alleged damages. Lincoln never communicated with SHIP, and SHIP neither received nor reviewed Lincoln's valuation reports. SHIP therefore cannot establish that Lincoln's reports induced it to enter into the IMAs or prevented it from discovering the purported fraud and terminating the IMAs. SHIP's claim that Lincoln's valuation reports allowed Beechwood to withdraw unearned performance fees and avoid its obligations to true-up SHIP's accounts finds no support in the evidence.

Third, Lincoln had no knowledge of the purported fraud, and thus SHIP cannot meet its heavy burden of establishing this critical element of its aiding and abetting claims.

Summary judgment for the remaining aiding and abetting claims is thus warranted.

FACTUAL BACKGROUND

Lincoln Enters Into Beechwood Engagement

Lincoln Partners and Lincoln International are sister companies and wholly-owned subsidiaries of Lincoln International, LP. (¶ 1.) Lincoln Partners offers a range of valuation services through its Valuations and Opinions Group ("VOG"). (¶ 2.)

On February 19, 2014, Lincoln Partners entered into an engagement letter with B Asset Manager, LP, together with its subsidiaries and affiliates (collectively, “Beechwood”). (¶ 4.) Lincoln International was not a party to the engagement letter. (¶ 5.) The engagement letter provided that Lincoln would perform quarterly positive assurance valuations, which would “be used by the Board of Directors of [Beechwood] to assist with its determination of the fair value of the Investments in accordance with the fair value measurement principles” of ASC 820. (¶ 6.) The engagement letter required Beechwood to furnish Lincoln with information and data concerning the investments that was “complete and correct in all material respects and [did] not contain any untrue statement of material fact or omit to state a material fact.” (¶ 9.) Beechwood further agreed that, with the exception of its auditors, it would “not permit any Valuation, any summary of or excerpt from any Valuation or any written materials prepared by Lincoln and provided to [Beechwood] in support of any Valuation . . . to be given to anyone who is not a party” to the engagement letter. (¶¶ 10-11.) Beechwood agreed to compensate Lincoln \$4,500 to \$5,500 per portfolio company valued per quarter. (¶ 12.) After entering into the engagement letter, Lincoln agreed to provide Beechwood monthly negative assurance letters in addition to the quarterly positive assurance valuations. (¶ 13.)

Valuation Process

ASC 820, the operative standard, guides how an entity should estimate the fair value of an asset for financial reporting. (¶ 15.) The ultimate objective is “to estimate the price at which an orderly transaction to sell the asset . . . would take place between market participants under current market conditions.” (¶ 16.) To perform the calculation, ASC 820 provides a “fair value hierarchy” that gives the “highest priority to quoted prices . . . in active markets for identical assets” and lower priority to “inputs other than quoted prices . . . that are observable” based on publicly available

market data. (¶ 17.) Lowest priority, however, is assigned to “unobservable inputs,” which constitute “inputs for which market data are not available and that are developed using the best information available.” (¶ 18.) ASC 820 does not prescribe a particular method for ascertaining unobservable inputs, but cites as examples an “income approach,” such as a discounted cash flow analysis, and “a market approach,” such as using quoted prices for similar financial instruments. (¶ 19.)

Most of the assets at issue here were illiquid and lacked observable market inputs, so the estimate of fair value depended on unobservable inputs. (¶ 28.) As ASC 820 contemplates, a fair value estimate of an asset—especially if predicated on unobservable inputs—requires the exercise of discretion to identify the appropriate valuation methodologies. (¶ 20.)

Under ASC 820, the ultimate responsibility for reporting fair value lies with the “reporting entity” (here, Beechwood). (¶ 21.) Lincoln assisted Beechwood with that process, but its role was limited in scope—to provide positive and negative assurance of *Beechwood’s* fair value measurements—a standard arrangement in the industry. (¶ 25.) In performing its valuations, Lincoln relied on information from Beechwood, as well as existing economic, financial, and market conditions, to opine whether Beechwood’s fair value estimates were reasonable (for positive assurance) or not unreasonable (for negative assurance) in accordance with ASC 820. (¶ 26.) Given the scope of Lincoln’s engagement, it had no authority or responsibility to audit Beechwood’s records, assess its investment strategy, independently appraise the assets and liabilities of any portfolio company, or interview the management of any portfolio company. (¶ 27.)

Within Lincoln, all of the valuations undergo several levels of review. (¶ 34.) First, an analyst or associate prepares a valuation model for a particular investment based on information

from the client (both orally and in writing) and gathered from public sources. (¶ 35.) That model is reviewed by an associate or project manager and then by VOG's Technical Review Committee, a group comprised of VOG's managing directors and certain senior advisors. (¶ 36.) If the Technical Review Committee approves the valuation model and conclusions, the analyst and associate prepare a draft of the valuation report, which is shared with the client and may undergo additional revisions. (¶ 37.) Before a final valuation report is issued, the report is reviewed and approved by one or more of VOG's managing directors. (¶ 38.)

Some of the assets Lincoln valued involved related-party transactions, which was not unusual. (¶¶ 29-30.) When related parties transact, a reporting entity still may assign value to those assets, as ASC 820 contemplates. (¶¶ 22, 30.) Indeed, the same "fair value hierarchy" applies to an asset that was exchanged in a related-party transaction. (¶ 23.) The lone difference is whether the transaction price between related parties may be used as an "input to a fair value measurement," which it can "if the reporting entity has evidence that the transaction was entered into at market terms." (¶ 24.)

Lincoln adhered to those principles here. (¶¶ 31-33.) From the outset, Lincoln understood that Beechwood had ties to Platinum Partners, and thus considered any transactions between the two as related-party transactions. (¶ 29.) Consistent with ASC 820, when identifying an entry price for an asset, Lincoln appropriately analyzed whether there was evidence the transaction was entered into at market terms, which it corroborated in part using Lincoln's internal proprietary data regarding the terms of similar debt instruments. (¶ 31.) More importantly, the initial transaction price (adjusted based on ensuing market conditions) was merely one input in Lincoln's fair value measurements. (¶ 32.) Lincoln evaluated several other inputs, relying on the income and market approaches, in accordance with ASC 820. (¶ 33.)

SHIP Enters into Investment Management Agreements

SHIP is an insurance company operating in run-off. (¶ 39.) In early to mid-2014, SHIP and Beechwood engaged in discussions regarding the prospect of Beechwood providing investment services to SHIP. (¶ 40.) On April 10, 2014, Beechwood sent SHIP's CEO two presentations about Beechwood's "asset management capabilities, strategies, and platform." (¶ 41.) In one presentation, one slide noted that Lincoln "evaluat[es] all valuations on a quarterly basis," and in the other presentation, two slides purport to describe "Lincoln's General Valuation Methodology" and "Lincoln Scope." (¶¶ 42-43.) Lincoln neither prepared nor reviewed the presentations, and was not involved in pitching or communicating with SHIP at any time. (¶¶ 45, 48.)

SHIP ultimately entered into three IMAs with Beechwood for investment management and advisory services. (¶ 46.) The first IMA, with Beechwood Bermuda International, Ltd., was executed as of May 22, 2014 (the "BBIL IMA"); the second IMA, with Beechwood Re Ltd, was executed as of June 13, 2014 (the "BRe IMA"); and the third IMA, with B Asset Manager LP, was executed as of January 15, 2015 (the "BAM IMA," and collectively, the "IMAs"). (¶ 47.) The first two IMAs guaranteed an investment return to SHIP "equal to 5.85% per annum (non-compounded) of the net asset value of the Assets contributed to the Account as of the date of the [IMAs]." (¶ 49.) Beechwood was entitled to a performance fee equal to 100% of the amount by which the net profit exceeded the investment return of the account for the year. (¶ 51.) Any annual shortfall in the investment return obliged Beechwood to make a true-up payment. (¶ 50.) The third IMA did not guarantee an investment return, but SHIP entered into a side letter with Beechwood Re Investments LLC, which guaranteed an annual investment return of 5.85% per annum (non-compounded) of the net asset value of the assets contributed by SHIP under the BAM IMA. (¶¶ 53-54.)

The IMAs provided that securities and investments without available price quotations would be “valued by or at the discretion of [Beechwood] in its reasonable discretion in a manner determined in good faith to reflect fair market value.” (¶ 55.) The IMAs further provided that, within 15 days after the end of the quarter, Beechwood would provide SHIP “valuation reports from an independent third-party valuation company (currently Lincoln International) on all non-public securities.” (¶ 56.) Lincoln had no knowledge of the IMAs or their terms. (¶ 57.)

Lincoln Performs Valuations for Beechwood

Most of Lincoln’s monthly valuation reports were unrelated to SHIP. (¶¶ 59-69.) From February 2014 through November 2014, Lincoln reported value for other Beechwood trust accounts, including those associated with a different insurance company, CNO. (*Id.*) Those reports do not refer to SHIP, the SHIP custody accounts, or the values of Beechwood’s investments in the SHIP custody accounts. (¶ 69.)

Lincoln’s valuation work for Beechwood took a toll on its staff. (¶ 70.) Not only were the investments complex and without observable inputs, thereby requiring significant analysis, but Beechwood was slow to provide Lincoln with the requested information, unduly prolonging the valuation process.¹ (*Id.*) The mounting frustration came to a head in December 2014, when Beechwood told Lincoln about a guarantee from Platinum for one of the investments, which had not been previously disclosed. (¶ 71.) Concerned about other potential information gaps, Lincoln responded by performing additional due diligence before issuing the fourth quarter valuations,

¹ The frustration among the Lincoln team members is reflected in emails exchanged among the analysts during this time period. (¶¶ 74-79, 81.) For example, in one email, an analyst sent a link to a *South Park* video clip with the statement “Beechwood investment strategy?” (¶ 77.) The *South Park* clip depicts money being invested in a series of complicated investments, which leads to the money being “gone.” (¶ 78.) The analyst testified that the only reason he circulated the clip was “to draw a parallel between the complicated nature of Beechwood’s investments relative to the complicated nature of the investments in that video.” (¶ 79; *see also* ¶ 81.)

including issuing an extensive list of questions to Beechwood, requesting additional documentation, conducting comprehensive news searches on the investments, and speaking with Beechwood's auditor, KPMG. (¶¶ 72, 80, 82-86.) Lincoln also convened a second Technical Review Committee analysis of Beechwood's portfolio for the fourth quarter reports. (¶ 87.)

Upon completion of that additional diligence, Lincoln concluded it had enough information to issue valuation reports for the fourth quarter. (¶ 88.) On January 16, 2015, Beechwood informed Lincoln that it would need three separate reports for the fourth quarter: a "Beechwood Re CNO report, a BBIL Ulico report and a Beechwood Re/BBIL Ship report." (¶ 89.) This was the first time that Beechwood asked Lincoln to prepare a report of Beechwood's investments in the SHIP custody accounts. (¶¶ 59-69.)

On January 19, 2015, Lincoln issued to Beechwood the three reports requested, including a report that valued Beechwood's investments in the SHIP custody accounts. (¶ 90.) In that valuation, Lincoln valued debt investments in four companies—MYSYRL Capital, New Bradley House, Northstar GOM Holdings, LLC, and San Gold Corp LLC. (¶¶ 91, 96.) Notably, Lincoln valued significantly below par two of these debt investments (Northstar and San Gold), which constituted nearly 40% of the total value of the investments. (¶¶ 92, 96.) Lincoln also valued a small equity investment in Agera Energy, LLC, as well as limited partnership investments in Platinum Partners Credit Opportunities Fund LLC ("PPCO") and Platinum Partners Value Arbitrage Fund LLC ("PPVA"). (¶¶ 93, 96.) The partnership investments were valued based on the net asset value ("NAV") reported by Platinum, which complies with ASC 820.² (¶ 94.) Because

² A "reporting entity is permitted, as a practical expedient, to estimate the fair value of an investment . . . using the net asset value per share . . . , if the net asset value per share of the investment (or its equivalent) is calculated in a manner consistent with the measure principles of Topic 946 as of the reporting entity's measurement date." (¶ 95.)

Beechwood’s valuation mark fell within Lincoln’s fair value range for each investment, Lincoln concluded that “Beechwood fair values as of December 31, 2014 . . . are reasonable, in accordance with the fair value measurement principles of [ASC 820].” (¶ 97.)

The report that valued Beechwood’s investments in the SHIP custody accounts was never sent to SHIP, nor was it sent to Wilmington Trust. (¶ 98.)

Wilmington Trust Account Statements

Approximately two weeks *before* Lincoln issued its valuation reports for the quarter ending December 31, 2014, Wilmington Trust issued account statements for the SHIP custody accounts for the month ending December 31, 2014, assigning a market value of \$87.1 million for the BRE SHIP account and \$16.1 million for the BBIL SHIP account. (¶¶ 119, 130.) Those values came from emails and spreadsheets sent by Beechwood in the days leading up to December 31—and not Lincoln’s valuation reports. (¶¶ 127-29.) This was the standard process followed by Beechwood and Wilmington Trust for updating the market values in account statements each month. (¶¶ 122-29.)

The values reflected in the Wilmington Trust account statements deviate from those contained in Lincoln’s later-issued valuation report, some of which are detailed in the chart below.

Investment	Wilmington Trust 12/31/14 value	Lincoln 12/31/14 value (Low)	Lincoln 12/31/14 value (High)
Abatement Capital	\$ 5,563,990	Not valued	
Alliance One International	\$ 5,355,000	Not valued	
Black Elk Energy	\$ 11,805,965	Not valued	
Market value gain/loss bank loans	\$ 5,377,519	Not valued	
Agera (Equity)	Not included	\$ 40,000	\$ 75,000
Northstar	\$ 12,750,000	\$ 10,533,000	\$ 11,298,000
PPVA	\$ 9,124,692	\$ 8,946,000	\$ 8,946,000
San Gold	\$ 19,024,640	\$ 14,363,000	\$ 15,529,000

(¶ 132.) In sum, only six of the seven investments that Lincoln valued as of December 31, 2014, are included in Wilmington Trust's account statements. (*Id.*) Of those six, half were assigned a higher value than Lincoln's valuation mark. (*Id.*)

Lincoln Terminates the Beechwood Engagement

After issuing the fourth quarter valuations, Lincoln decided to terminate the Beechwood engagement because the valuation process was absorbing an enormous amount of personnel resources. (¶ 99.) While Beechwood asked Lincoln to reconsider its decision to terminate and offered to increase Lincoln's compensation, Lincoln declined, and the termination was effective February 19, 2015. (¶¶ 100, 104.) That same day, Lincoln issued its final negative assurance letters to Beechwood for the month ending January 31, 2015, including one letter that valued Beechwood's investments in the SHIP custody accounts. (¶ 107.) That letter valued investments in the same seven portfolio companies as the December 31 valuation, and again, two of the investments were valued significantly below par. (¶ 108.) The January negative assurance letter was never sent to SHIP or Wilmington Trust. (¶ 109.)

After Lincoln terminated, Beechwood engaged Duff & Phelps to perform valuations of its investments, including those in the SHIP custody accounts. (¶ 115.) Duff & Phelps issued its first valuation report for the quarter ending March 31, 2015, and that report—unlike the Lincoln reports—was sent to SHIP on April 20, 2015. (¶ 116.) Duff & Phelps issued valuation reports every quarter in 2015 and 2016. (¶ 118.) Notably, the valuation marks assigned by Duff & Phelps in its March 31, 2015 valuation report were consistent with or *higher than* Lincoln's marks for the quarter ending December 31, 2014. (¶ 117.)

Performance Fee Withdrawals and True-up Payments

Over the course of the IMAs, Beechwood withdrew performance fees of \$34,968,981 from the SHIP custody accounts. (¶ 134.) All but one performance fee of \$1,000,000 were withdrawn *after* Lincoln terminated its engagement with Beechwood and when Duff & Phelps valued SHIP's investments. (¶ 135.) The one performance fee withdrawn during Lincoln's engagement occurred on October 2, 2014, and was based on the market value of the BRe IMA account as of September 30, 2014. (*Id.*) As discussed above, Lincoln issued no valuation reports for Beechwood's investments in the SHIP custody accounts as of September 30, 2014, and the market values in the Wilmington Trust account statements were not based on Lincoln's valuation reports. (¶¶ 65-66, 69, 123-25.) In fact, Wilmington Trust never received a Lincoln valuation report during the course of the IMAs. (¶ 121.) And the values in Wilmington Trust's account statements were based on the values reported to it by Beechwood, which often deviated from Lincoln's marks. (¶¶ 122-32.)

Platinum Revelations

In June 2016, federal authorities arrested Murray Huberfeld, a former Platinum executive, and the ongoing federal investigation of Platinum became public. (¶ 139.) At that time, SHIP had over \$65 million invested in Platinum hedge funds PPVA and PPCO. (¶ 140.) The following month, on July 25, 2016, the Wall Street Journal published an article on the Platinum fraud probe and the ties to Beechwood. (¶ 141.) Despite these developments and SHIP's sizable investments in PPVA and PPCO, SHIP paid a performance fee of \$11,118,981 to Beechwood on August 2, 2016. (¶ 143.)

PROCEDURAL BACKGROUND

On July 24, 2018, SHIP filed a 13-count complaint against Beechwood, alleging that Beechwood committed a multi-year fraud and breached its contractual and fiduciary duties to SHIP

under the three IMAs. (No. 18-cv-6658, Dkt. No. 1.) Nearly a year later, on July 31, 2019, SHIP filed this action against Lincoln, alleging for the first time that Lincoln participated in Beechwood's purported fraud of SHIP. (Dkt. No. 5.) SHIP asserted claims against Lincoln for fraud, negligent misrepresentation, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, civil conspiracy, contribution and indemnity, and unjust enrichment/constructive trust. (*Id.*) After discovery revealed that SHIP had no evidence to support its fraud claim against Lincoln because it had neither received nor reviewed Lincoln's valuation reports—as SHIP repeatedly alleged in its complaint—SHIP filed an amended complaint on October 30, 2019, asserting five of the same claims, but dropping its claims for fraud and negligent misrepresentation. (Dkt. No. 39.) On December 3, 2019, the Court granted in part and denied in part Lincoln's motion to dismiss—dismissing the claims for civil conspiracy, contribution and indemnity, and unjust enrichment/constructive trust, and allowing SHIP to proceed on two claims for aiding and abetting fraud and aiding and abetting breach of fiduciary duty. (Dkt. No. 48.)

STANDARD OF REVIEW

A “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Summary judgment is properly granted when the non-moving party ‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.’” *Abramson v. Pataki*, 278 F.3d 93, 101 (2d Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). In opposing summary judgment, “the non-moving party must do more than show that there is ‘some metaphysical doubt as to the material facts’ and it ‘may not rely on conclusory allegations and unsubstantiated

speculation.”” *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608, 619 (S.D.N.Y. 2009) (citations omitted).

ARGUMENT

To survive summary judgment on its aiding and abetting fraud claim, SHIP must adduce sufficient evidence, under a *clear and convincing* standard, showing (1) the existence of an underlying fraud; (2) Lincoln’s knowledge of the fraud; and (3) substantial assistance by Lincoln in the achievement of the underlying fraud. *de Abreu v. Bank of Am. Corp.*, 812 F. Supp. 2d 316, 322 (S.D.N.Y. 2011); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608, 625 (S.D.N.Y. 2009). Similarly, to survive summary judgment on its aiding and abetting a breach of fiduciary duty claim, SHIP must adduce sufficient evidence showing “(1) ‘a breach of fiduciary obligations to another of which [Lincoln] had actual knowledge;’ (2) ‘that [Lincoln] knowingly induced or participated in the breach;’ and (3) ‘that [SHIP] suffered damages as a result of the breach.’” *Id.* (quoting *Sharp Int’l Corp. v. State St. Bank*, 403 F.3d 43, 49-50 (2d Cir. 2005)). Where, as here, “‘the same activity is alleged to constitute the primary violation underlying both claims’ . . . , the claim for aiding and abetting fraud overlaps substantially with the claim for aiding and abetting breach of fiduciary duty.” (Dkt No. 48 at 10 (quoting *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt., LLC*, 479 F. Supp. 2d 349, 360 (S.D.N.Y. 2007)).)³

The undisputed facts compel summary judgment on SHIP’s aiding and abetting claims. There is no evidence that Lincoln substantially assisted a fraud or breach of fiduciary duty by issuing two valuation reports, let alone evidence that Lincoln knew of any purported fraud by

³ For this reason, unless otherwise noted, these two claims are analyzed together.

(cont’d)

Beechwood. Because SHIP has failed to marshal evidence supporting these two critical elements of its aiding and abetting claims, summary judgment is warranted.⁴

I. Lincoln Did Not Substantially Assist a Fraud or Breach of Fiduciary Duty.

Both aiding and abetting claims require that SHIP present evidence showing that Lincoln substantially assisted a fraud or breach of fiduciary duty by “affirmatively assist[ing], help[ing] conceal or fail[ing] to act when required to do so, thereby enabling the breach [or fraud] 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) (citation omitted). 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 establishing “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.

SHIP alleges that Lincoln substantially assisted Beechwood’s multi-year fraud by issuing two valuation reports to Beechwood in January and February 2015 that willfully overvalued Beechwood’s investments in the SHIP custody accounts. Yet SHIP admits it never received or reviewed Lincoln’s valuation reports, and discovery has confirmed that Wilmington Trust did not receive the valuation reports at issue either. (¶¶ 98, 109.) SHIP is thus left with the theory that Lincoln willfully overvalued certain investments in January and February 2015, that Beechwood

⁴ This brief addresses only the allegations and claims against Lincoln. Of course, if the Court dismisses SHIP’s primary fraud and/or breach of fiduciary duty claims against the Beechwood defendants in the master case, No. 18-cv-6658, the corresponding aiding and abetting claims against Lincoln must also be dismissed.

conveyed those valuation “marks” to Wilmington Trust, and that Wilmington Trust incorporated those marks into account statements that went to SHIP. The undisputed evidence, however, refutes SHIP’s theory for three reasons. First, there is no evidence that Lincoln’s fair value opinions of Beechwood’s illiquid investments deviated from ASC 820, much less that the marks were willfully inflated. Indeed, the following quarter, Duff & Phelps independently arrived at valuation conclusions that were consistent with or higher than Lincoln’s conclusions. Second, Lincoln’s valuation reports only went to Beechwood, the alleged primary wrongdoer, and Beechwood did not, in fact, transmit the valuation marks in Lincoln’s reports to Wilmington Trust or SHIP. And third, Lincoln’s valuation reports cannot have caused SHIP’s damages. Because there are no disputed issues of material fact on the essential element of substantial assistance, summary judgment is warranted.

A. Lincoln Did Not Overvalue Any of the Investments.

Now that SHIP has disavowed any reliance on the valuation reports themselves, SHIP’s entire case hinges on the theory that Lincoln disregarded ASC 820 and purposefully inflated the valuations of seven investments. But SHIP cannot identify one instance in which Lincoln’s analysis failed to comply with ASC 820, much less that the valuation marks so strayed from the range of reasonableness as to expose Lincoln to aiding and abetting liability.

A defendant cannot be held liable for a fair value opinion unless it was both objectively false and disbelieved by the defendant at the time it was expressed. *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 111-12 (2d Cir. 2011); *NECA-IBEW Pension Trust Fund v. Bank of Am. Corp.*, No. 10 Civ. 4401(LAK), 2013 WL 620257, at *15 (S.D.N.Y. Feb. 15, 2013). That is because the measurement of fair value, particularly for illiquid investments like the ones Lincoln valued, is subjective and discretionary. *See Fait*, 655 F.3d at 110 (“There is no universally infallible index of fair market value. There may be a range of prices with reasonable claims to being fair market

value.” (quoting *Henry v. Champlain Enters., Inc.*, 445 F.3d 610, 619 (2d Cir. 2006)); *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 376 F. Supp. 2d 385, 396 (S.D.N.Y. 2005) (“[T]he defendants’ hedge funds ‘involved non-exchange listed securities, the valuation of which may differ depending on the model used in the calculations.’ In other words, valuation of such securities was not a matter of looking up closing prices in the *Wall Street Journal*, but involved the exercise of judgment.” (citation omitted)); *NECA-IBEW Pension Tr.*, 2013 WL 620257 at *15 (dismissing claims where “plaintiffs’ allegations still show only that [defendant] overvalued illiquid assets whose valuation was highly subjective”).

Valuing illiquid investments is highly subjective and a range of values may reasonably be deemed as “fair,” as courts recognize, *see Fait*, 655 F.3d at 110, yet no witnesses or documents here suggest that Lincoln’s valuation marks were objectively false. In fact, SHIP has not even alleged, let alone offered evidence, what it believes the “correct” fair value of the investments at issue was at the time. Even SHIP’s “expert”—who did not review Lincoln’s valuation models or the underlying documentation—acknowledged that he was not opining on whether any of the investments had been overvalued during Lincoln’s engagement.⁵ (¶¶ 113-14.) Previously, SHIP set forth three theories in its Complaint for why Lincoln’s valuation marks were false. (Compl. ¶¶ 93-136) But discovery has laid bare the flaws in each theory.

SHIP’s first theory is that Lincoln knowingly relied on deficient information and documentation when issuing valuation reports. (Compl. ¶ 95.) SHIP never identifies any standard by which it deems the documentation “deficient”—likely because ASC 820 does not provide one—nor does SHIP identify an instance in which Lincoln pressed ahead without a necessary document. Instead, SHIP’s Complaint cites a handful of documents that Lincoln requested but

⁵ Lincoln will be filing a motion to strike SHIP’s expert report.

which Beechwood purportedly failed to provide. Not only is there no evidence that such documents were necessary to valuing the investments, but more importantly, SHIP cannot point to one “missing” document that somehow caused the valuation mark to be objectively false, so any perceived deficiency is irrelevant.

Second, SHIP claims that because certain Beechwood investments had ties to Platinum, those investments could not be assigned a fair value under ASC 820. (*See, e.g.*, Compl. ¶¶ 105, 112, 115.) That proposition, however, finds no support in evidence and runs counter to ASC 820 itself, as well as industry practice. Related parties often transact business, and that by no means prevents a reporting entity from reporting fair value. (¶¶ 22, 30) As ASC 820 instructs, the transaction price in a related party transaction may be used as an “input into a fair value measurement . . . if the reporting entity has evidence that the transaction was entered into at market terms.” (¶ 24.) That is precisely what Lincoln did here—it tested the transactions to ensure that they were at market terms, regardless of any relationship between transacting parties. (¶¶ 31-33.) SHIP has no evidence that Lincoln failed to perform that testing. Indeed, SHIP’s expert was not even aware that Lincoln’s analysis existed. (¶ 114.) In short, SHIP has no evidence that the related-party investments—or any of the investments—were willfully overvalued.

Third, SHIP claims that Lincoln failed to act independently, including by failing to disclose the related-party connection between Beechwood and Platinum and modifying its valuation method to arrive at the valuation ranges that Beechwood desired. (*See, e.g.*, Compl. ¶¶ 120, 126.) As an initial matter, the scope of Lincoln’s “disclosure” to Beechwood is a red herring because SHIP never saw Lincoln’s reports. (¶¶ 98, 109.) And SHIP cannot point to a single instance in which Lincoln changed its valuation method to achieve a higher valuation range for Beechwood. The undisputed evidence shows that Lincoln did act independently from Beechwood. Indeed, for

two of the four debt investments, Lincoln departed from Beechwood and valued them significantly *below* par. (¶¶ 92, 96, 108.) More importantly, none of these allegations, even if true, supports a claim that the valuation marks were inflated or otherwise objectively false.

Not only does SHIP lack evidence establishing the falsity of Lincoln's valuation marks, but Lincoln's expert offered unrefuted testimony confirming the reasonableness of Lincoln's fair value measurements. (¶¶ 112-13.) Lincoln's expert reviewed the supporting documentation and tested the valuation marks, concluding that the fair value measurements for December 31, 2014, and January 31, 2015, were reasonable. (¶ 112.) SHIP does not have any evidence to dispute this testimony or otherwise establish that Lincoln's valuation conclusions were objectively false.

SHIP seeks to hold Lincoln liable for the entirety of Beechwood's purported fraud—and SHIP's claimed damages of over a hundred million dollars—for issuing two valuation reports to Beechwood that valued seven investments, two of which were valued significantly below the mark originally assigned by Beechwood. The undisputed evidence, however, establishes that Lincoln's valuation analysis complied with ASC 820, and SHIP has not adduced any evidence that Lincoln's valuation marks were incorrect, much less that they were so outside a range of reasonableness as to justify an aiding and abetting claim. Accordingly, summary judgment is warranted.

B. There Is No Evidence That Anyone Other Than Beechwood Received the Lincoln Valuation Reports at Issue.

SHIP's aiding and abetting claims fail for an additional reason—the undisputed evidence establishes that the Lincoln reports that valued Beechwood's investments in the SHIP custody accounts were not sent to anyone other than Beechwood, the alleged primary wrongdoer. As discussed above, SHIP has acknowledged that it neither received nor reviewed Lincoln's valuation reports. (¶¶ 98, 109) Yet in order to avoid dismissal, SHIP pivoted to a new theory in its Amended Complaint—that Beechwood sent Lincoln's valuation reports to Wilmington Trust, which used

those reports to mark valuation positions in SHIP's account statements. (Compl. ¶¶ 144-45). The Court cited those allegations in its opinion denying Lincoln's motion to dismiss. (Dkt. No. 48 at 7, 14.) Discovery, however, has revealed that to be another allegation without evidence. Wilmington Trust did not receive a single Lincoln valuation report during the existence of the SHIP IMAs. (¶¶ 98, 109.)

Because nobody other than Beechwood received the two valuation reports at issue, SHIP's complaints about Lincoln's purported failure to disclose information in those reports—like ties between Beechwood and Platinum—is a red herring. Even if Lincoln “disclosed” to Beechwood that it had ties to Platinum, as SHIP claims it should have, nothing would be different because SHIP neither received nor reviewed the reports.⁶

SHIP is thus left with the theory that Beechwood, the claimed fraudster, received reports from its valuation provider and dutifully conveyed the valuation marks to Wilmington Trust, which then conveyed them to SHIP. Duff & Phelps, however, was the valuation provider that issued all the reports for Beechwood's investments in the SHIP custody accounts, with the exception of two instances in early 2015 before Lincoln exited. (¶¶ 115, 118.) More importantly, this theory does not fit the factual timeline: Wilmington Trust updated the market values in the account statements *before* Lincoln's report was issued, so Lincoln could not have been the “source” of those values. (¶¶ 119, 122-29.) Before the end of each month, Beechwood emailed Wilmington Trust the market values for each of the investments as of the upcoming month end, which Wilmington Trust used to update the values in the month-end statements for the SHIP custody accounts. (¶¶ 122-29.) All

⁶ Moreover, Lincoln cannot be held liable for failing to disclose information in those reports because Lincoln owed no legal duty to SHIP, as the Court has already recognized. *See SPV OSUS*, 2016 WL 3039192 at *6 (citation omitted); No. 18-cv-6658, Dkt. No. 654 at 130-31 (concluding that no special relationship existed between CNO and Lincoln where “Lincoln was engaged by the Beechwood entities” and “the end and aim of the engagement was to benefit Beechwood”).

of that happened before Lincoln issued the relevant valuation report on January 19, 2015. (¶ 90.) That Beechwood provided market values without Lincoln’s assistance is confirmed by the numbers themselves: Beechwood’s values *well exceeded* Lincoln’s for three of the seven investments that Lincoln valued as of December 31, 2014, and one of the investments that Lincoln valued—Agera equity—does not appear in Wilmington Trust’s statements. (¶ 132.) The undisputed evidence therefore establishes that Lincoln’s valuation reports were not the “source” of the values in the Wilmington Trust account statements.

Even if Lincoln may somehow be tied to any marks that Beechwood conveyed to Wilmington Trust (and then to SHIP) on two occasions in early 2015, that cannot constitute substantial assistance of Beechwood’s purported multi-year fraud, particularly where Lincoln valued only seven of Beechwood’s investments in the SHIP custody accounts, two of which were valued significantly below par. (¶¶ 92, 96, 108.) SHIP’s claim that Lincoln’s two valuations substantially assisted Beechwood is even more implausible considering that SHIP neither received nor reviewed Lincoln’s reports, and continued doling out performance fees for a year and a half after Duff & Phelps replaced Lincoln, even after it knew that Platinum was the subject of a pending criminal investigation for fraud. (¶¶ 98, 109, 134, 139-43.) SHIP’s attempt to hold Lincoln liable for over a hundred million dollars for substantially assisting the fraud should be rejected.

C. Lincoln’s Valuation Reports Did Not Cause SHIP Any Harm.

SHIP alleges that it was harmed by Lincoln’s valuation reports in two ways. First, SHIP claims that Lincoln’s valuation reports induced SHIP to enter into the IMAs and prevented SHIP from discovering the fraud and terminating the IMAs. (*See, e.g.*, Compl. ¶ 188.) Second, SHIP claims that Lincoln’s valuation marks allowed Beechwood to withdraw unearned performance fees and avoid its obligation to true-up SHIP’s accounts. (*See, e.g.*, Compl. ¶¶ 189-92.) Neither causation theory, however, finds any support in the evidence.

1. Lincoln did not induce SHIP to enter into the IMAs or otherwise do anything that prevented SHIP from discovering the fraud and terminating the IMAs.

SHIP's first causation theory—that Lincoln induced SHIP to enter into the IMAs and prevented SHIP from discovering the fraud—fails for lack of evidence. Lincoln never communicated with SHIP, either before or after SHIP's entry into the IMAs, including in any sales pitch to SHIP. (¶ 48.) The only evidence that SHIP has identified in support of its inducement theory are two presentations that Beechwood prepared and sent to SHIP on April 10, 2014. (¶¶ 41-44.) These presentations cannot create a disputed issue of material fact. There is no evidence that Lincoln had any knowledge of these presentations. (¶ 45.) Indeed, the word "SHIP" never appears in any Lincoln valuation report until January 2015. (¶ 69.)

SHIP also lacks evidence that Lincoln's valuation reports prevented SHIP from discovering the fraud and terminating the IMAs. Because SHIP neither received nor reviewed Lincoln's valuation reports, nothing contained (or not disclosed) in those reports prevented SHIP from discovering Beechwood's purported fraud and terminating the IMAs. The only information that could have ever made its way to SHIP was the valuation mark itself. And even that did not reach SHIP. By the time Lincoln downgraded the value of certain investments, Beechwood had already sent its values, which were higher than Lincoln's marks. (¶¶ 127-28) Even if SHIP could establish that it received inflated marks from Lincoln—which it cannot—SHIP does not have a single witness who will testify that SHIP would have terminated the IMAs had all seven investments that Lincoln valued been below par (as opposed to two of them).

2. Lincoln's valuation reports did not enable Beechwood to withdraw unearned performance fees or avoid its obligation to true-up SHIP's accounts.

SHIP's failure to adduce any evidence that Lincoln overvalued Beechwood's investments in the SHIP custody accounts—let alone how much they were purportedly overvalued—dooms its

theory that Lincoln's valuation reports allowed Beechwood to withdraw unearned performance fees and avoid its obligations to true-up SHIP's accounts. Without any evidence to show that the valuation marks were objectively false, SHIP cannot establish that any performance fee was unearned or that any true-up payment was required.

This causation theory fails for a second reason. The performance fee withdrawals and any true-up payments were based on market values in the Wilmington Trust account statements, and, as discussed above, the undisputed evidence establishes that those values did not originate from Lincoln's valuation reports. In fact, of the \$34,968,981 in performance fees SHIP authorized, only one performance fee of \$1,000,000 occurred during Lincoln's engagement with Beechwood. (¶¶ 134-35.) It was based on values as of September 30, 2014, months before Lincoln issued the first valuation report valuing Beechwood's investments in the SHIP custody accounts. (¶¶ 69, 90, 135-36.) The remaining performance fee withdrawals occurred after Lincoln terminated the Beechwood engagement and during the time that Duff & Phelps was issuing quarterly valuations for Beechwood's investments. (¶¶ 118, 135, 137-38.) In short, SHIP has no evidence tying Lincoln's valuation reports to the market values in the Wilmington Trust account statements.

As for the annual true-up payment that Beechwood was required to make if there was a shortfall in the SHIP accounts as of December 31 (¶ 50), SHIP has no evidence that the market values in the Wilmington Trust statements as of December 31, 2014, originated from Lincoln's valuation reports. In fact, as set forth above, the evidence directly contradicts this theory.

II. Lincoln Did Not Have Actual Knowledge of Any Purported Fraud or Breach of Fiduciary Duty.

SHIP's aiding and abetting claims fail for an additional reason—the undisputed evidence shows that Lincoln had no knowledge of Beechwood's purported fraud. Aiding and abetting claims require “[a] showing of *actual* knowledge of the alleged fraud”—“recklessness” or “constructive

knowledge—the possession of information that would cause a person exercising reasonable care and diligence to become aware of the fraud—is insufficient.” *de Abreu v. Bank of Am. Corp.*, 812 F. Supp. 2d 316, 322-23 (S.D.N.Y. 2011) (citation omitted); *see also Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 592 F. Supp. 2d 608, 625 (S.D.N.Y. 2009). “The burden of demonstrating actual knowledge . . . [is] a heavy one.” *de Abreu*, 812 F. Supp. 2d at 323 (citation omitted). And where, as here, the defendant is under no independent duty to the plaintiff, “even alleged ignorance of obvious warning signs of fraud will not suffice to adequately allege ‘actual knowledge.’” *Id.* (quoting *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 547 (S.D.N.Y. 2007)); *see also id.* at 324 (granting summary judgment where plaintiffs failed to adduce sufficient evidence of defendant’s “actual knowledge of the alleged Ponzi scheme”).

SHIP’s allegations mirror in many ways the allegations brought by the plaintiffs in *Pension Committee*. In that case, the plaintiffs claimed that the defendants assisted a fraud by improperly valuing a fund’s NAV using inflated prices and incorrect methodologies. 592 F. Supp. 2d at 627. The plaintiffs argued that the defendants “blindly accepted prices for unlisted securities from [the fund manager] when they should have ensured that these prices were reasonable.” *Id.* at 628. The court, however, granted partial summary judgment for claims arising before June 2001,⁷ concluding that there was no evidence that the defendants had acted recklessly (for the primary securities violations), let alone with knowledge of the fraud (for the aiding and abetting claims). *Id.* at 628-29, 642. The court rejected the plaintiffs’ argument that the defendants should have ensured that the prices of unlisted securities were reasonable, stating that the defendants “may not have had a duty to ensure these prices were reasonable” and even assuming they did have a duty

⁷ In June 2001, the defendants were informed by the funds’ external auditor that there were problems with the calculation of the NAV, and therefore there were disputed issues over whether the defendants acted recklessly after June 2001. 592 F. Supp. 2d at 618.

to verify the value, “their failure to do so—in the absence of further evidence of deceit—would at most amount to negligence, not recklessness.” *Id.* at 628.

SHIP, like the plaintiffs in *Pension Committee*, cannot meet its heavy burden of establishing that Lincoln had actual knowledge of Beechwood’s purported fraud or the overvaluation of investments. SHIP deposed ten Lincoln witnesses—including the four managing directors of the valuations and opinions group who signed off on the Beechwood valuations, the associate who ran the Beechwood engagement, and several low-level analysts involved in the engagement—and no witnesses testified that they had any knowledge of fraud or impropriety by Beechwood. (¶ 110.) Nor did any witness testify that Lincoln believed that it was overvaluing any of the investments or that the valuation marks were otherwise false. (¶ 111.)

Instead, the uncontroverted testimony and documents reflect that Lincoln carried out extensive due diligence before issuing the fourth quarter valuation reports that valued Beechwood’s investments. (¶¶ 72-73, 80, 82-88) Lincoln posed an extensive list of questions to Beechwood, conducted multiple Technical Review Committee reviews of Beechwood’s portfolio, and held off issuing the valuation reports until it had the information it needed to value the investments. (*Id.*) That due diligence process did not, however, resolve Lincoln’s concern that Beechwood was not *timely* in providing Lincoln with the information it needed to value the investments, which led Lincoln’s staff to spend an inordinate amount of time completing Beechwood’s valuations.⁸ (¶ 70, 99.) Because SHIP lacks evidence supporting this critical element of its aiding and abetting claims, summary judgment is warranted.

⁸ While SHIP has claimed that certain emails exchanged among the junior members of the Lincoln team reveal knowledge of a fraud, those employees refuted that theory in their deposition testimony. (¶¶ 76, 79.)

III. The Court Should Grant Summary Judgment to Lincoln International LLC

Even if the Court declines to dismiss the claims against Lincoln Partners, it should grant summary judgment to Lincoln International. Lincoln Partners was the only Lincoln party engaged by Beechwood, and the only Lincoln party to issue valuation reports to Beechwood. (¶ 5.) Lincoln International played no role in the Beechwood engagement or the alleged conduct.

“[A]ffiliated corporations are, as a rule, treated separately and independently so that one will not be held liable for the contractual [or legal] obligations of the other absent a demonstration that there was an exercise of complete dominion and control.” *In re Refco Inc. Sec. Litig.*, 826 F. Supp. 2d 478, 495 (S.D.N.Y. 2011) (citation omitted). SHIP has not adduced any evidence to establish that Lincoln International “exercise[d] complete dominion and control” over Lincoln Partners, and therefore Lincoln International cannot be held responsible for the alleged conduct attributable to Lincoln Partners. Summary judgment for Lincoln International is warranted.

CONCLUSION

Lincoln respectfully requests that the Court grant summary judgment on all remaining claims.

Dated: February 14, 2020

/s/ William Ridgway

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CERTIFICATE OF SERVICE

I hereby certify that, on February 14, 2020, I served the foregoing Memorandum of Law in Support of Lincoln International LLC and Lincoln Partners Advisors LLC's Motion for Summary Judgment 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