UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

REPLY MEMORANDUM OF LAW IN SUPPORT OF LINCOLN INTERNATIONAL LLC AND LINCOLN PARTNERS ADVISORS LLC'S MOTION FOR SUMMARY JUDGMENT

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Charles F. Smith (admitted *pro hac vice*)
William Ridgway (admitted *pro hac vice*)
155 North Wacker Drive
Chicago, IL 60606
Tel: 312.407.0700
Fax: 312.407.0411
charles.smith@skadden.com
william.ridgway@skadden.com

Robert A. Fumerton
Lara A. Flath (admitted *pro hac vice*)
Four Times Square
New York, NY 10036
Tel: 212.735.3000
Fax: 212.735.2000
robert.fumerton@skadden.com
lara.flath@skadden.com

Counsel for Defendants Lincoln International LLC and Lincoln Partners Advisors LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SHIP[1] claims that Lincoln aided and abetted a two-year fraud perpetrated by Beechwood by purportedly overvaluing dozens of Beechwood's investments. Discovery, however, has not borne out SHIP's allegations. In opposing summary judgment, SHIP fails to articulate the underlying fraud allegedly perpetrated by Beechwood, much less present evidence that Lincoln knowingly and substantially assisted that fraud.

In fact, SHIP never received Lincoln's valuation reports, and after full discovery SHIP has reduced its case against Lincoln for $254 million in damages to an assertion that *two* account statements issued by Wilmington Trust in early February 2015 reflect values that may be traced to Lincoln for *four* (out of nearly a dozen) investments. Yet even here, SHIP is wrong—as these four investments cannot be tied to Lincoln. Moreover, SHIP presents no evidence that the valuations for these four investments—or the other three Lincoln valued—were objectively false. Abandoning its theory from the Complaint, SHIP now acknowledges that related-party transactions are common and may receive a fair market value under ASC 820. SHIP's new theory is that Lincoln substantially assisted a fraud by failing to heed certain guidance from ASC 820 and by not notifying SHIP and other third parties about Lincoln's termination and Platinum-Beechwood ties. Even if SHIP's latest theories were true—which they are not—they cannot support aiding and abetting claims. There is no evidence that the fair value measurements of the handful of illiquid investments at issue were objectively false, and the law imposes no duty on

[1] Capitalized terms have the same meaning assigned to them in Lincoln's opening brief. "Opp." Refers to Plaintiff's (Corrected) Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Dkt. No. 62). "Lincoln 56.1" refers to Local Rule 56.1 Statement of Undisputed Facts in Support of Lincoln International LLC and Lincoln Partners Advisors LLC's Motion for Summary Judgment (Dkt. No. 52). "SHIP 56.1" refers to SHIP's Response to Defendants' Local Rule 56.1 Statement of Undisputed Facts (Dkt. No. 57). "Lincoln Resp. to SHIP 56.1" refers to Lincoln International LLC and Lincoln Partners Advisors LLC's Response to Senior Health Insurance Company of Pennsylvania's Counterstatement of Disputed Facts, filed herewith.

Lincoln to provide any information to a non-client like SHIP.

Nor can SHIP tie the fair value measurements for any investment—and certainly not the four SHIP has identified—to any purported damages. Not even SHIP's former CEO, who submitted a sworn declaration in opposition to summary judgment, could state that SHIP would have terminated the IMAs had the fair values been lower. Instead, he speculated about how SHIP would have responded to knowing about related-party transactions and Lincoln's termination—information Lincoln had neither the opportunity nor the duty to apprise SHIP about. SHIP also cannot survive summary judgment with its one-sentence allegation (without any record citation) that the fair value measurements somehow enabled Beechwood to avoid its annual obligation to true-up the SHIP custody accounts eleven months later in December 2015.

Finally, SHIP's claims about Lincoln's knowledge amount to, at most, the type of "red flags" that cannot support a finding that Lincoln had actual knowledge of the purported fraud.

Accordingly, summary judgment for the remaining aiding and abetting claims is warranted.

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

A. Only Four Investments Valued by Lincoln Were Purportedly Sent to SHIP.

SHIP no longer disputes that neither SHIP nor Wilmington Trust received the two Lincoln valuation reports at issue. (SHIP 56.1 ¶¶ 98, 109.) Nor does SHIP any longer claim that the December 31, 2014 Wilmington Trust statements reflect Lincoln's valuations. (*Id.* ¶ 131.) Instead, SHIP now asserts that the values of four investments in Lincoln's January 19, 2015 valuation—Northstar, New Bradley House, MYSYRL Capital, and PPCO—are reflected in a spreadsheet sent by Beechwood to Wilmington Trust, which Wilmington Trust used to update account statements that SHIP received for the month ending January 31, 2015.[2] (Opp. 6-7.)

[2] SHIP has not set forth any evidence that the three other investments that Lincoln valued in the *(cont'd)*

In other words, SHIP's claim that Lincoln substantially assisted a two-year fraud, and caused $254 million in damages, comes down to the values of four investments in two monthly trust statements sent to SHIP—by somebody other than Lincoln—in early February.[3] Even if SHIP were right, this could not constitute substantial assistance of a multi-year fraud, and the cases cited by SHIP do not support such an expansive view of substantial assistance. *See, e.g.*, *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 466, 510-12 (S.D.N.Y. 2001) (evidence that brokers provided hundreds of potentially inflated marks over a two-year period created a disputed fact).

And SHIP is wrong: SHIP cannot even trace those four investment values back to Lincoln. The Wilmington Trust monthly statements were based on reports from *Beechwood*, the purported fraudster, and SHIP has adduced no evidence from Beechwood that it based its values on Lincoln's valuation reports. (Lincoln Resp. to SHIP 56.1 ¶¶ 179, 181.) Indeed, facts show otherwise: for at least four of the seven investments valued by Lincoln, Beechwood provided Wilmington Trust with a value that deviated significantly from Lincoln's marks. (*Id.* ¶ 181.)

B. Lincoln Did Not Overvalue Any of the Investments.

SHIP does not dispute that the valuation of illiquid investments, like those at issue here, is highly subjective and a range of values may reasonably be deemed as "fair." *See Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011). Nor does SHIP dispute that a defendant cannot be held liable for a fair value opinion unless the opinion was both objectively false and disbelieved

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January 19, 2015 report—Agera (equity), San Gold, and PPVA—or the seven investments in the February 2015 negative assurance letter, were reflected in any Wilmington Trust statement.

[3] SHIP also claims that Lincoln was identified as the "price source" for two investments—Agera and PPCO—in a 9/30 holdings report sent by Beechwood to SHIP in October 2014. (Opp. 7-8.) The "price source" spreadsheet assigns a market value of $25,375,878 for Agera and $9,134,365 for PPVA. (Lincoln Resp. to SHIP 56.1 ¶ 187.) Notably, Lincoln did not issue a valuation report for Beechwood's investments in the SHIP custody accounts as of September 30, 2014 (Lincoln 56.1 ¶¶ 65-66, 69), and SHIP has not pointed, and cannot point, to a Lincoln valuation report that valued Beechwood's investments in Agera for $25.4 million and PPVA for $9.1 million.

by the defendant at the time it was expressed. *See id.* at 111-12. Yet SHIP does not even contend that Lincoln's fair value measurements—for either the four investments identified above (Northstar, MYSYRL Capital, New Bradley House, and PPCO) or the other three valued by Lincoln—were objectively false, let alone present evidence sufficient to survive summary judgment.

Instead, SHIP's sole argument is that Lincoln did not comply with ASC 820, a principles-based standard that does not require a particular methodology, as SHIP concedes. (SHIP 56.1 ¶ 19.) The only issue SHIP identifies is that Lincoln purportedly failed to obtain evidence from Beechwood that certain unidentified related-party transactions were entered into at market terms.[4] (Opp. 19-21.) SHIP, however, wholly ignores all the evidence that Lincoln received from Beechwood, such as the terms of the transaction and financial documentation for the portfolio company. (Lincoln Resp. to SHIP 56.1 ¶¶ 203-04.) Moreover, nothing in ASC 820 requires that the "evidence" come from the reporting entity. Indeed, ASC 820 states that a reporting entity should "develop unobservable inputs using the best information available in the circumstances, which *might* include the reporting entity's own data" and should "take into account all information about market participant assumptions that is reasonably available." (*Id.* ¶ 203 (emphasis added).) That is precisely what Lincoln did here. Lincoln used the information it received from Beechwood, in addition to Lincoln's own proprietary market data, which supported Lincoln's conclusion that the initial investments were at market terms.[5] (Lincoln 56.1 ¶ 31.)

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[4] Notably, SHIP does not present any evidence that three of the four debt investments valued by Lincoln—MYSYRL Capital, San Gold, and New Bradley House—were related-party transactions.

[5] SHIP is wrong that there is no "contemporaneous evidence" that Lincoln tested the transactions to determine whether they were at market terms. (Opp. 20 n.6.) Lincoln's valuation models reflect Lincoln's analysis of the transaction at the issuance date. For example, Lincoln prepared an excel valuation model for the New Bradley House investment titled "NBH Model_Issuance_v0.1.xlsm." *(cont'd)*

Even if it were true that Lincoln failed to obtain enough evidence that the related-party investments were at market terms, that bears on a single input—the initial transaction price. But the initial price is not the only way to value an investment. Other independent market and business inputs may be relied on under ASC 820. Lincoln relied upon that other data, and performed several other analyses such as the income and market approaches, consistent with ASC 820, to determine the present value as of the valuation date (Lincoln 56.1 ¶¶ 32-33), yet SHIP ignores all of that work. In attacking only one valuation input to the exclusion of Lincoln's other independent inputs, SHIP is left without evidence that Lincoln's ultimate values were wrong, much less that they were so wrong as to be objectively false.[6]

Although Lincoln does not have the burden of proof, Lincoln submitted expert opinion evidence that establishes the reasonableness of Lincoln's fair value measurements. (*Id.* ¶ 112.) SHIP, without citing to any evidence, states that it "disputes" the expert analysis and "objects to this paragraph because it is the subject of expert opinion." (SHIP 56.1 ¶ 112.) Expert opinion, however, may be used to support summary judgment. *See Nussbaum v. Metro-N.Commuter R.R.*, 994 F. Supp. 2d 483, 489 (S.D.N.Y. 2014). Because SHIP has offered no evidence to rebut Lincoln's expert opinion evidence,[7] the reasonableness of Lincoln's fair value measurements

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(Lincoln Resp. to SHIP 56.1 ¶ 205.) This valuation model tested the transaction as of the transaction date, March 17, 2014. (*Id*.)

[6] SHIP does not address in its Opposition the valuation of Beechwood's limited partnership interests in PPCO and PPVA, but disputes in its response to Lincoln's Rule 56.1 Statement that the valuation of those two investments was in accordance with ASC 820. (SHIP 56.1 ¶ 94.) While SHIP acknowledges that ASC 820 permits the estimation of fair value using NAV, SHIP claims that there is no evidence that Lincoln did anything to confirm that the NAV of the Platinum funds was calculated in a manner consistent with ASC Topic 946. (*Id.*) Lincoln, however, does not have the burden here–SHIP does. SHIP has not presented any evidence that the Platinum NAV was not calculated in a manner consistent with ASC Topic 946 and that it was thus improper for Lincoln to use the NAV.

[7] Indeed, SHIP's expert admitted that he did not opine on whether any of the investments were *(cont'd)*

should be deemed admitted under Federal Rule of Civil Procedure 56(e) and Local Rule 56.1.

C. Lincoln Did Not Conceal the Purported Fraud.

Lacking evidence that Lincoln's fair value measurements were objectively false, SHIP pivots and claims that Lincoln substantially assisted a fraud by taking "additional steps—after it terminated Beechwood—to assist Beechwood and conceal the fraud from others." (Opp. 1.) These new theories, however, are without merit.

According to SHIP's first theory, after informing Beechwood of the termination, Lincoln directed two junior analysts to prepare a sham "Zombie Valuation" for three new investments (Montsant Partners, MNYK, and Kennedy RH Holdings) that Beechwood requested. (Lincoln Resp. to SHIP 56.1 ¶ 215.) This allegation is a red herring—none of those investments was valued in the ensuing negative assurance letter. (*Id.*) SHIP's attempt to fault Lincoln for overvaluing investments Lincoln did not even value for the SHIP custody accounts is hollow.

SHIP's second theory is that Lincoln failed to disclose to Beechwood's auditor (KPMG), Beechwood's subsequent valuation provider (Duff & Phelps), and SHIP itself (i) that Lincoln had terminated the engagement, (ii) the circumstances surrounding the termination, (iii) that Beechwood and Platinum were related parties, and (iv) Beechwood's investment in related-party transactions.[8] (Opp. 2, 13-15, 23-24.) Critically, SHIP does not cite to any authority for the novel proposition that Lincoln had a duty to volunteer the above information to its former client's auditor, subsequent valuation provider, and investor. Quite the contrary, mere inaction, as SHIP alleges here, cannot constitute substantial assistance unless "the defendant owes a fiduciary duty directly

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overvalued during Lincoln's engagement. (Lincoln 56.1 ¶ 114.)

[8] Notably, there is no evidence that SHIP or Duff & Phelps ever communicated with Lincoln or reviewed Lincoln's valuation reports. It is thus apparently SHIP's theory that Lincoln should have sought out SHIP and Duff & Phelps and informed them of the above information.

(cont'd)

to the plaintiff," which Lincoln did not. *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 346 (2d Cir. 2018) (rejecting theory that defendants could be held liable for aiding and abetting because they failed to notify investors of the purported fraud).[9]

SHIP's theory also finds no support in the record. SHIP did not take any discovery from KPMG or Duff & Phelps. Nor did SHIP ask any of Lincoln's witnesses about the March 2015 KPMG call or Lincoln's interactions, if any, with Duff & Phelps. SHIP offers no more than speculation about the discussions Lincoln may or may not have had with KPMG and Duff & Phelps, which is improper at summary judgment. *See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 592 F. Supp. 2d 608, 625 (S.D.N.Y. 2009) (non-moving party "may not rely on conclusory allegations or unsubstantiated speculation").[10]

D. Lincoln's Valuation Reports Did Not Cause SHIP Any Harm.

SHIP does not contend that Lincoln engaged in any misconduct that induced SHIP to enter into the IMAs. Instead, SHIP claims that Lincoln's subsequent failure to apprise SHIP and KPMG of Lincoln's termination of the engagement and the related-party transactions "harmed SHIP by contributing to preventing SHIP from discovering the fraud and terminating the IMAs." (Opp. 23.) As discussed above, this alleged inaction cannot constitute substantial assistance because Lincoln owed no duty to SHIP. Moreover, SHIP's causal chain—which is supported only by a self-serving

[9] While SHIP contends that Lincoln knew that SHIP was an IMA client of Beechwood's who was purportedly relying on Lincoln's valuations—which Lincoln disputes (Lincoln Resp. to SHIP 56.1 ¶ 164)—Lincoln's alleged knowledge of SHIP is irrelevant and does not impose any sort of duty on Lincoln to disclose information to SHIP. *Accord In re Platinum-Beechwood Litig.*, No. 18-cv-6658 (JSR), 2019 WL 4934967, at *46 (S.D.N.Y. Oct. 7, 2019) (Lincoln had no "special relationship" with CNO that would have imposed a duty on Lincoln, despite allegation that Lincoln knew CNO was receiving and relying on its reports).

[10] SHIP's claim that Lincoln attempted to "cover[] its tracks" by backdating the termination letter to the effective date of the termination (Opp. 2) makes little sense. Indeed, SHIP has not presented any evidence that the termination letter was viewed by anyone other than Beechwood.

declaration from SHIP's former CEO, Brian Wegner, in which he speculates as to what SHIP and KPMG might have done if they had learned the above information—is simply "too attenuated to constitute proximate cause." *SPV*, 882 F.3d at 333.

Critically, SHIP does not present any evidence that the value of the investments—the only information from Lincoln that allegedly made its way to SHIP—prevented SHIP from discovering the fraud and terminating the IMAs. Tellingly, while SHIP submitted Wegner's declaration to support its other causation arguments, Wegner does not contend that SHIP would have terminated the IMAs had the investments been valued lower. (*See* SHIP 56.1 Ex. 67.)

SHIP also proffers no evidence that Lincoln's valuation reports led to Beechwood's withdrawal of unearned performance fees. In fact, SHIP acknowledges that the performance fee withdrawals, except for one, post-date Lincoln's termination of the engagement. (Opp. 23; SHIP 56.1 ¶ 135.) And SHIP has not submitted any evidence tying the October 2014 performance fee to a Lincoln valuation report—nor can it because Lincoln did not issue a valuation report for Beechwood's investments in the SHIP custody accounts until January 2015. (Lincoln 56.1 ¶ 136.)

SHIP devotes only one sentence to its theory that Lincoln's purportedly inflated valuations "enabled Beechwood to avoid its obligations under the IMAs to true up SHIP's accounts." (Opp. 23.) But SHIP's conclusory allegation, without any citation to the record, is not enough to survive summary judgment. *See Pension Comm.*, 592 F. Supp. 2d at 625. SHIP does not explain how Lincoln's valuations allowed Beechwood to avoid its annual obligation to true up SHIP's accounts. The 2014 year-end Wilmington Trust statements did not reflect Lincoln's valuations, as SHIP has acknowledged. (SHIP 56.1 ¶¶ 131-32.) And SHIP fails to explain how the January 31, 2015 statements—the only ones that allegedly reflect any of Lincoln's valuation marks—bear on any 2016 annual true-up payment. Without evidence tying Lincoln's fair value measurements to

SHIP's damages, SHIP's claims must fail.

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

SHIP has not met its "heavy" burden of establishing that Lincoln had actual knowledge of Beechwood's purported fraud or breach of fiduciary duty. *See de Abreu v. Bank of Am. Corp.*, 812 F. Supp. 2d 323 (S.D.N.Y. 2011). In its Opposition, SHIP focuses on Lincoln's purported knowledge of the Beechwood-Platinum ties and the related-party transactions. (Opp. 3, 8-10, 17.) But related parties frequently transact, as SHIP acknowledges. (SHIP 56.1 ¶ 30.) Related-party transactions are not in most instances wrong or fraudulent, and are capable of receiving a fair value measurement. (*Id.*) *See also de Abreu*, 812 F. Supp. 2d at 325 (defendants' knowledge of transactions with "black market currency traders," which were not per se improper, was not evidence of actual knowledge of alleged Ponzi scheme); *Pension Comm.*, 592 F. Supp. 2d at 627-28 (knowledge of "imprudent" valuation methodology was not knowledge of fraud).[11]

SHIP also cites to Lincoln's purported concerns about "Beechwood's integrity and truthfulness." (Opp. 17.) Even under SHIP's flawed portrayal of the evidence, that Lincoln had these concerns does not amount to actual knowledge of a fraud.[12] Indeed, courts routinely hold that "red flags" do *not* constitute actual knowledge of a fraud. *See, e.g.*, *de Abreu*, 812 F. Supp. 2d

[11] SHIP attempts to distinguish *Pension Committee* by stating that there were no facts suggesting that the fund administrator was on notice of the fraud at the fund. (Opp. 18.) In fact, plaintiffs in that case pointed to (i) an internal memorandum that warned that defendant was improperly valuing the restricted shares, and (ii) instances in which defendant "blindly accepted prices for unlisted securities … when they should have ensured that these prices were reasonable." *Pension Comm.*, 592 F. Supp. 2d at 627-28. The court, however, concluded that such evidence was not sufficient to establish recklessness, let alone actual knowledge. *Id.* at 628.

[12] SHIP's claim that the South Park video clip depicts money being invested in a series of opaque investments that "are designed to defraud a customer" is not accurate. There is no reference or implication in the video that the transactions were designed to defraud. (Dkt. No. 39 ¶ 151 n.13.)

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at 323, 325-26.[13]

Finally, SHIP's allegation that Lincoln instructed analysts to destroy documents to cover up a fraud is baseless and borders on bad faith. SHIP asked every Lincoln witness about that topic and uncovered no evidence that the instruction was anything other than Lincoln following its written policies and procedures to delete draft analyses and valuations that did not underlie the final valuation. (SHIP 56.1 ¶ 105.) SHIP quibbles that Lincoln deviated from its policies and procedures because it sent the email before the final valuation was issued (*id.*), but the policies provide that this process was to be followed on a quarterly basis. (Lincoln Resp. to SHIP 56.1 ¶ 211.) As is routine, Lincoln's associate sent an email following the issuance of the fourth quarter valuation and another after Lincoln issued the final negative assurance letter. (*Id.* ¶¶ 211, 218-19.)

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

SHIP claims that it is "not seeking to hold Lincoln International liable for the conduct of Lincoln Partners," but rather for the conduct of its employees under a respondeat superior theory. (Opp. 24 & n.7.) Other than claim that four members of the engagement team were employed by Lincoln International (Opp. 24), SHIP has not supported this new theory with any evidence. The valuation reports and the work behind them—the only assistance any Lincoln party is alleged to have given—were performed on behalf of Lincoln Partners alone. SHIP's respondeat superior theory, therefore, fails.

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[13] The cases cited by SHIP are distinguishable. *See Silvercreek Mgmt. Inc. v. Citigroup Inc.*, 346 F. Supp. 3d 473, 488-98 (S.D.N.Y. 2018) (denying summary judgment where there was ample evidence that defendants had actual knowledge of the fraudulent nature of the Enron transactions); *Oster v. Kirschner*, 905 N.Y.S.2d 69, 72 (2010) (denying motion to dismiss where plaintiffs sufficiently alleged that defendant had knowledge of misrepresentations in various private placement memoranda); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 652 F. Supp. 2d 495, 504-05 (S.D.N.Y. 2009) (denying summary judgment where there was evidence that defendants knowingly increased the values in position reports to values that were "too good to be true").

Dated: March 17, 2020

/s/ William Ridgway
Charles F. Smith (admitted *pro hac vice*)
William Ridgway (admitted *pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, IL 60606
Tel: 312.407.0700
Fax: 312.407.0411
charles.smith@skadden.com
william.ridgway@skadden.com

Robert A. Fumerton
Lara A. Flath (admitted *pro hac vice*)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
Tel: 212.735.3000
Fax: 212.735.2000
robert.fumerton@skadden.com
lara.flath@skadden.com

Counsel for Defendants Lincoln International LLC and Lincoln Partners Advisors LLC

CERTIFICATE OF SERVICE

I hereby certify that, on March 17, 2020, I served the foregoing Reply 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