UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN TROTT AND CHRISTOPHER SMITH, as Joint Official Liquidators and Foreign Representatives of PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation) and PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (in Official Liquidation), Plaintiffs, -v- PLATINUM MANAGEMENT (NY) LLC, ET AL., Defendants.	Case No.: 18-cv-10936 (JSR) NOTICE OF DEFENDANT'S, SETH GERSZBERG, MOTION FOR RECONSIDERATION

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in support of this motion, Defendant Seth Gerszberg ("Defendant"), by and through his undersigned Counsel, hereby moves this Court, before the Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, at Courtroom 14B of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York, 10007, for an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and Local Rule 6.3 reconsidering the Court's Order dated June 21, 2019, denying Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint, in its entirety and with prejudice, for failing to state a claim upon which relief can be granted.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Rule 6.1, any answering papers shall be served no later than July 26, 2019, and any reply memoranda of law shall be served no later than August 2, 2019.

Dated: July 12, 2019

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S, SETH GERSZBERG, MOTION FOR RECONSIDERATION

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I. PRELIMINARY STATEMENT

Defendant, Seth Gerszberg ("Mr. Gerszberg"), makes this motion for reconsideration with respect to the Court's Opinion and Order dated June 21, 2019, (the "June 21 Order"), which granted in part and denied in part Mr. Gerszberg's Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC")[1] pursuant to *Fed. R. Civ. P.* 12(b)(6) (the "Motion to Dismiss"). It is respectfully submitted that the Court overlooked controlling case law with respect to the substantial assistance element of the claims made against Mr. Gerszberg and, as such, incorrectly found that, "Gerszberg substantially assisted in the breaches that led to his enrichment and that he proximately caused the injuries that PPVA suffered." *See In re Sharp Int'l Corp.*, 403 F.3d 53, 50 (2d Cir. 2005). Indeed, had the Court considered the relevant controlling case law it would have concluded that Mr. Gerszberg had no duty to PPVA by virtue of his role in the complained of transactions. Application of the relevant case law leads to the conclusion that both claims asserted against him fail as a matter of law. As such, it is respectfully submitted that the Court should reconsider the June 21 Order and dismiss the SAC as against Mr. Gerszberg.

Plaintiffs instituted this action alleging claims of fraud, constructive fraud, and breach of fiduciary duties, among others, against certain PPVA insiders. With no justification for including Mr. Gerszberg in the SAC, Plaintiffs lumped Mr. Gerszberg in with the other alleged bad actors by referring to him as a "close friend" or "informal advisor" to Nordlicht. Even though the SAC is devoid of any allegation that Mr. Gerszberg was a principal, member, director, employee, agent, officer, or fiduciary that qualified him as a PPVA insider, Plaintiffs assert that Mr. Gerszberg

[1] In the interest of brevity, the Court is referred to Mr. Gerszberg's moving papers for a full recitation of facts, and incorporates all terms used therein as well as in the June 21 Order.

"assisted" the PPVA insiders in their alleged bad acts against PPVA and received financial benefits as a result. Nothing could be further from the truth.

The 188-page SAC alleges that Mr. Gerszberg entered into certain transactions with PPVA and negotiated deals for himself and the entities he controlled. Controlling case law, not considered by the Court is clear: A party on the opposing side of a transaction who works out a deal for himself and in his own interest does not provide substantial assistance to the insider they were negotiating with. In a situation like the matter *sub judice*, where the Court has correctly found that Mr. Gerszberg did not hold any position at PPVA nor owe any fiduciary duties to PPVA, nothing in the SAC gives rise to the inference that Mr. Gerszberg's transactions amounted to rendering substantial assistance to any of the alleged PPVA insiders. Nevertheless, the Court found that Mr. Gerszberg's business acumen and ability to negotiate a good deal for his benefit and that of his businesses' benefit somehow amounts to a claim that he "substantially assisted in the breaches that led to his enrichment and that he proximately caused the injuries that PPVA suffered." It does not. Any possible or arguable enrichment realized by Mr. Gerszberg was due to the fact that he relied on his wits and resources to extricate himself from peril. *See In re Sharp Int'l Corp.*, 403 F.3d 53, 50 (2d Cir. 2005). Had the Court considered and applied the *In re Sharp* case and similar decisions to the facts presented, it should have reached a different conclusion. In light of the above, and as set forth in greater detail below, it is respectfully submitted that the Court should reconsider the June 21 Order and grant Mr. Gerszberg's Motion to Dismiss.

II. LEGAL ARGUMENT

A. Legal Standard

Under *Fed. R. Civ. P.* 60(b) and Local Rule 6.3, motions for reconsideration may be granted where there is, among other things, the need to correct a clear error or prevent manifest injustice.

Premium Sports, Inc, v. Connell, Civ. No. 10-3753 (KBF), 2012 U.S. Dist. LEXIS 97982 (S.D.N.Y. July 11, 2012) *citing Virgin Atl. Airways, Ltd, v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992); s*ee also Catskill Dev., L.L.C. v. Park Place Entm't Corp.,* 154 F. Supp. 2d 696, 701 (S.D.N.Y. 2001). Mr. Gerszberg seeks reconsideration to correct a clear error as the Court appears to have failed to consider the matter of *In re Sharp,* and its application to the allegations against Mr. Gerszberg. *See Anders v. Verizon Communs., Inc,* Civ. No. 16-5654 (VSB), 2018 U.S. Dist. LEXIS 212108 (S.D.N.Y. December 17, 2018) *citing Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995) ("unless the moving party can point to controlling decisions or data that the court overlooked - matters, in other words, that might reasonably be expected to alter the conclusion reached by the court").

As fully set forth below, Mr. Gerszberg meets the high standard for reconsideration as the application of controlling case law on the concept of substantial assistance element changes the outcome of the Court's June 21 Order.

B. The Court Overlooked New York Case Law in its Analysis of the Substantial Assistance Element of the Claims against Mr. Gerszberg.

Under New York law, "a person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator…..Substantial assistance may only be found where the 'alleged aider and abettor affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.'" *See In re Sharp Int'l Corp.*, 403 F.3d at 50 (2d Cir. 2005) *citing Kaufman v. Cohen*, 3017 A.D. 2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dep't 2003). *In re Sharp* centered around allegations that the Defendant Bank, although aware of the controlling shareholders' fraudulent activities, arranged quietly for the controlling shareholders to repay the Defendant's loan from the proceeds of new loans from unsuspecting lenders. There the Defendant's motion to dismiss was granted by the Bankruptcy Court on the

grounds that "Plaintiffs [Sharp] had failed to plead that the Defendant [State Street] had actual knowledge of the controlling shareholders' [Spitzes] fraud (i.e. looting), or that Defendant [State Street] participated in or induced the controlling shareholders' fraud. *See In Re Sharp Int'l Corp.*, 403 F.3d at 49. The Bankruptcy Court's decision was affirmed by the District Court saying that "although Plaintiff [Sharp] had adequately alleged Defendant's [State Street] actual knowledge of the Spitzes entire two step scheme, Sharp had not alleged that State Street "participated in" or "induced" the Spitzes fraud…" *Id.* On appeal, the Appellate Court began its analysis on the assumption that the Defendant knew about the controlling shareholders' fraud but concluded that "the complaint says no more than that Defendant [State Street] relied on its own wits and resources to extricate itself from peril, without warning persons it had no duty to warn" *Id.* at 51. The Court reasoned that the Plaintiffs failed to "identify any duty on the Defendant's [State Street] part to precipitate its own loss in order to protect lenders that were less diligent." *Id.* at 53.

In re Sabine Oil & Gas Corp., 547 B.R. 503, 564 (S.D.N.Y. 2016), dealt with constructive fraudulent transfer claims in connection with several transactions that ultimately resulted in the Debtor oil corporation guaranteeing an additional $890 million in debt despite being insolvent. The creditors' committees sought to obtain derivative standing to prosecute several claims, including one for aiding and abetting breach of fiduciary duty against the Defendants. Specifically, the creditors' committees alleged that certain lenders participated in negotiating the debt financing. In rejecting the aiding and abetting claims, the Court stated, "it would be a bizarre perversion of corporate law to hold the defendant [First Reserve] liable for trying to negotiate against its counterparty for the best deal possible"). 547 B.R. at 564.

Similarly, here, the crux of the SAC is that Mr. Gerszberg (a "close friend" of Mr. Nordlicht), negotiated for himself and the entities he controlled, business deals that favored his

interests and not that of PPVA's. Surely, Mr. Gerszberg's ability to strike a good bargain does not amount to participation in the alleged looting by PPVA insiders. Indeed, even if Mr. Gerszberg had knowledge of the alleged looting by the PPVA insiders, knowledge alone placed no duty on Mr. Gerszberg to consider PPVA's interests during the negotiation of those transactions. *See In re Sharp Int'l Corp.*, 403 F.3d at 53.

Plaintiffs' claims against Mr. Gerszberg are that he allegedly "aided and abetted the Platinum Defendants' breaches of their fiduciary obligations to PPVA in connection with the Second Scheme" by:

> (i) causing PPVA to allegedly incur significant liabilities due to the Purported Underlying West Loop/Epocs Obligations; (ii) negotiating certain Second Scheme Transactions on behalf of the Platinum Defendants; (iii) negotiating and drafting the Forbearance and Security Agreement on behalf of West Loop/Epocs; and (iv) directing the transfer of $15 million in Agera Sale proceeds to himself (via Spectrum30) and Franky Zapata, all of which actions were a detriment to PPVA and its subsidiaries.

In other words, Plaintiff describes transactions in which Mr. Gerszberg and/or entities he controlled were adverse to PPVA – in which Mr. Gerszberg sat on the opposite side of the table from PPVA – and in which, using whatever information he was able to obtain, he negotiated favorable deals for himself, entities he controlled, and for others to whom money may have been owed by those entities. Like in *In Re Sharp* significantly absent from the SAC is the identity of any duty on Mr. Gerszberg's part to precipitate his own loss in order to protect PPVA and/or its investors. *See In re Sharp Int'l Corp.* 403 F.3d at 53. Application of the foregoing case law illustrates that the allegations against Mr. Gerszberg cannot be characterized as "substantial assistance."

Contrary to the June 21 Order, the SAC does not allege that Mr. Gerszberg "substantially assisted in the breaches that lead to his enrichment and that he proximately caused the injuries that

PPVA suffered." Op. [ECF 408], p. 45. The Court's error can be traced to its finding that the SAC "plausibly alleged that Gerszberg engaged in multiple transactions that stripped PPVA of its value, and that he did so with actual knowledge of PPVA's financial difficulties and the Platinum Defendants' fiduciary breaches…" Op. [ECF 408], p. 44 & 45. That holding however cannot be reconciled with the long-standing precedent that "substantial assistance may only be found where the alleged aider and abettor affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. *Kaufman v. Cohen*, 3017 A.D. 2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dep't 2003). *See also SPV OSUS Ltd. v. AIA LLC,* Civ. No. 16-619 (JSR), 2016 U.S. Dist. LEXIS 69349 * 23 (S.D.N.Y. May 26, 2016); *Hongying Zhao v. JPMorgan Chase & Co.,* Civ. No. 7-8570 (NRB), 2019 U.S. Dist. LEXIS 40673* 20 (S.D.N.Y. March 13, 2019) (rejecting plaintiff's argument that the defendant's inaction and/or failure to report allegedly suspicious or illegal activity amounted to substantial assistance). Mr. Gerszberg did not owe PPVA any duty and did not, otherwise, have any duty to act or refrain from acting, that prevented him from negotiating with PPVA in the manner alleged in the SAC. As such, the claims against him must fail.

A review of the SAC reveals that Mr. Gerszberg relied on his own wits and resources to extricate himself and his businesses from peril. *See In Re Sharp Int'l Corp.*, 403 F.3d at 51. Having correctly found that Mr. Gerszberg was not an insider as alleged by Plaintiffs, the Court should have continued its analysis by inquiring into whether Mr. Gerszberg had a duty, at all, to PPVA and/or its creditors. Had the Court considered *In re Sharp* it would have concluded that he did not. Instead the Court completed its analysis on its findings that the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, or the Spectrum 30 Loan would not have happened without Mr. Gerszberg. While it is true that the transactions could not

have happened without him, that is so because he sat opposite PPVA on each transaction. Absent any duty to PPVA, Mr. Gerszberg's only duty was to himself and the entities he controlled.

III. CONCLUSION

For all the reasons set forth in Mr. Gerszberg's moving papers and for the reasons set forth above, this Court should grant the instant motion for reconsideration of the June 21 Order, and in light of the legal and factual issues raised herein, dismiss the Second Amended Complaint as against Mr. Gerszberg.

DATED: July 12, 2019

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