UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN TROTT AND CHRISTOPHER SMITH, AS JOL, Plaintiffs, -v- PLATINUM MANAGEMENT (NY) LLC, ET AL., Defendants.	Case No.: 18-cv-10936 (JSR)

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

EPSTEIN OSTROVE, LLC
Elliot D. Ostrove, Esq.
Vahbiz P. Karanjia, Esq.
200 Metroplex Dr., Suite 304
Edison, New Jersey 08817
Telephone: (732) 828-8600

and

43 West 43rd Street, Suite 139
New York, NY 10036
Telephone: (646) 300-8600
Attorneys for Defendant, Seth Gerszberg

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I. PRELIMINARY STATEMENT

Defendant, Seth Gerszberg ("Mr. Gerszberg"), submits this memorandum of law in further support of his Motion For Reconsideration of 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").

Plaintiffs cite a plethora of case law on the standard for reconsideration and highlight the number of times *In re Sharp* was raised by Mr. Gerszberg in his Motion to Dismiss before the Court, thereby reinforcing the thrust of Mr. Gerszberg's Motion for Reconsideration. Although *In re Sharp* was raised in Mr. Gerszberg's moving papers, it is respectfully submitted that the Court failed to consider *In re Sharp* and/or apply its holding to the facts alleged in the SAC. Had the Court done so, it would have granted Mr. Gerszberg's Motion to Dismiss in its entirety. The allegations in the SAC do not change the fact that Mr. Gerszberg sat on the opposite side of the table from PPVA, and, as such, his only duty was to himself and to the entities he controlled. Plaintiffs do not deny this fact. Instead, they argue that Mr. Gerszberg's purported knowledge of the alleged wrongdoing by certain PPVA insiders is sufficient to hold him liable. The law is clear; absent a showing that Mr. Gerszberg owed a duty to PPVA, any claim that he substantially assisted the PPVA insiders must fail. The only allegations gleaned from the SAC is that Mr. Gerszberg, a "close friend" to Mr. Nordicht, gained knowledge of certain information and used that knowledge to his advantage. The SAC fails to allege that Mr. Gerszberg had any duty to precipitate his own loss in order to protect PPVA and/or its investors. As such, the Court should not have found that

[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.

Mr. Gerszberg "substantially assisted in the breaches that led to his enrichment and that he proximately caused the injuries that PPVA suffered." Op., p. 45 [ECF 408].

Further, Plaintiffs misconstrue *In re Sharp* by arguing that it is applicable to secured creditors, alone. Indeed, *In re Sharp* has been applied to a plethora of cases for the well settled principle 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.'" *See In re Sharp Int'l Corp.*, 403 F.3d 43, 50 (2d Cir. 2005) *citing Kaufman v. Cohen*, 760 N.Y.S.2d 157, 169 (1st Dep't 2003) (emphasis added). The SAC is devoid of any allegation that Mr. Gerszberg did more than negotiate against his counter party for the best deal possible. Because the Court failed to consider the case of *In re Sharp* and apply its holding to the substantial assistance element of Plaintiffs' claims against Mr. Gerszberg, reconsideration of the June 21 Order is warranted.

A. This Court should Reconsider the June 21 Order Because it Failed to Consider *In re Sharp.*

The standard on a motion for reconsideration is well settled. *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). Contrary to Plaintiffs' assertion, Mr. Gerszberg does not seek to relitigate an issue that was already decided by the Court. A finding that substantial assistance was sufficiently alleged against Mr. Gerszberg entails a finding that the SAC alleged that Mr. Gerszberg owed a duty to PPVA. The number of times *In re Sharp* was raised by Mr. Gerszberg is inconsequential and fails to show that it was considered by the Court. Indeed, an exacting review of the June 21 Order reveals that

the Court makes no mention of *In re Sharp,* whatsoever, and did not otherwise complete the analysis required to find a viable claim to have been asserted against Mr. Gerszberg. The Court's decision is based on 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., pp. 44 & 45 [ECF 408]. Absent from the June 21 Order is any finding that the SAC alleges that Mr. Gerszberg had any duty to PPVA and/or its investors, whatsoever, let alone a duty to precipitate its own loss in order to protect them. *See In re Sharp Int'l Corp.* 403 F.3d at 50. Because the application of *In re Sharp* can be expected to alter the conclusion reached by the Court, Mr. Gerszberg meets the high standard for reconsideration. *See Ivan Visin Shipping Ltd. v. Onego Shipping & Chartering 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).

Likewise, Plaintiffs' assertion that the Court implicitly rejected *In re Sharp* is misplaced. The Court erroneously concluded 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. Having concluded 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. The Court's failure to consider that issue within the context of the holding in the matter of *In re Sharp,* and its application to the allegations against Mr. Gerszberg is an error, which should be corrected. *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).

B. This Court Should Reconsider the June 21 Order Because the SAC Does Not Allege That Mr. Gerszberg Owed PPVA a Duty

Plaintiffs' assertion that the Court correctly found that Mr. Gerszberg "substantially assisted" in the PPVA insiders breaches of fiduciary duty is belied by the Court's analysis. The Court held:

> By contrast, the Court concludes that the SAC fails to allege insider status as to the other moving defendants. Feuer, Taylor, Narain, Nordlicht, Cassidy Gerszberg, Katz, and HFF are not alleged to have held positions at PPVA, or to have owed fiduciary duties to PPVA. Plaintiffs go to great lengths to detail the ways in which these defendants harmed PPVA,..., but harm is insufficient to establish insider status....

Op., p. 21 [ECF 408].

The Court goes on to hold:

> Through the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, and the Spectrum 30 Loan, Gerszberg and his affiliates were allegedly awarded various financial benefits at the expense of PPVA and that these benefits were awarded without consideration and unambiguously operated at PPVA's expense.....Gerszberg substantially assisted in the breaches that led to his enrichment and that he proximately caused the injuries that PPVA suffered. Indeed, it is hard to imagine how the Purported West Loop/Epocs Obligations, the Forbearance and Security Agreement, and the Spectrum 30 Loan would have happened without him.

Op., pp. 43, 45 [ECF 408].

Notwithstanding the above, Plaintiffs conclude, "Gerszberg's actions as alleged in the SAC and as this Court held, are the classic type of 'substantial assistance' that constitutes an aiding and abetting claim of breach of fiduciary duty." (*See* Plaintiffs' Opp. at p.11). Plaintiffs are wrong. In *Lerner v. Fleet Bank, N.A.*, 459 F. 3d 273 (2d. Cir. 2006), the Plaintiffs Investors alleged that the Defendant Bank aided and abetted a lawyer's breach of fiduciary duty by failing to report his overdrafts on attorney fiduciary accounts. The Court of Appeals held:

> Because of their duty to prevent a diversion, the defendant banks in this case stand on the very different footing from, for example, the defendants in Sharp, who had "no affirmative duty under New York law to inform [the looted corporation], [its] existing creditors, or [its] prospective creditors of [the] fraud," Sharp, 403 F.3d at 52 n.2, no duty to consider the interests of anyone else," and no duty to "precipitate its own loss in order to protect lenders that were less diligent," *id.* at 53....

Id. at 295.

Here, like the defendants in *In re Sharp*, Mr. Gerszberg had no affirmative duty under New York law to consider the interests of anyone else in negotiating the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement and the Spectrum 30 Loan with PPVA. Having found that Mr. Gerszberg was not an "insider" or "alter ego" of an insider, the Court was required to consider whether Mr. Gerszberg owed PPVA a duty that prevented him from transacting with PPVA in the manner alleged in the SAC. *See In re Sharp Int'l Corp.* 403 F.3d at 53. A finding that Mr. Gerszberg had knowledge of PPVA's financial difficulties while negotiating with PPVA is not enough to find "substantial assistance." Like in *In re Sharp*, whatever Mr. Gerszberg knew about PPVA's financial difficulties, he came by through diligent inquiries that any other third party could have made. *Id.* at 52.

Further, the Court's focus on Mr. Gersberg's alleged knowledge of information and arguable enrichment led to its erroneous conclusion that substantial assistance was found in the matter *sub judice*. The Defendant Bank in *In re Sharp*, was alleged to have executed contractually required letters that gave the controlling shareholders consent to acquire loans from unsuspecting lenders despite having knowledge of the controlling shareholders' fraud. Specifically, the Plaintiff there alleged that without the Defendant Bank's consent, the controlling shareholders would not have been able to acquire those loans. *In re Sharp,* 403 F.3d at 52. Notwithstanding the above allegations, the Court held, "State Street's consent was mere forbearance, it did no more than

remove a contractual impediment that was reserved to State Street to invoke or not in its own interest." Id. at 53. (emphasis added). In other words, even though the Defendant Bank knew of the controlling shareholders' fraud and, it provided the affirmative consent required for the controlling shareholders to obtain loans from others, the Bank did not substantially assist any breach of fiduciary duty.

Here, the only finding by the Court in its June 21 Order was that the SAC alleged that Mr. Gerszberg, having knowledge of PPVA's financial difficulties, negotiated for himself and the entities he controlled, business deals that favored his interests and not that of PPVA's. Had the Court considered *In re Sharp* it would have continued its analysis and ultimately found that because Mr. Gerszberg had no duty to consider PPVA's interests, the claims in the SAC do not support a finding of substantial assistance. *See In re Sharp Int'l Corp.*, 403 F.3d at 53.

C. The Court Should Grant Mr. Gerszberg's Motion for Reconsideration Because *In re Sharp* is not Limited to Secured Creditors

Plaintiffs' argument that *In re Sharp* is limited to secured creditors is too narrow. *In re Sharp* in no way stands for the proposition that "a secured creditor enforcing its contractual rights against a borrower and taking no 'affirmative acts' beyond such contractual rights cannot be substantial assistance for purposes of an aiding and abetting breach of fiduciary duty claim." (*See* Plaintiffs' Opp. at p.13). The Second Circuit by virtue of its application of *In re Sharp* to a dispute that did not involve secured creditors, necessarily negates Plaintiffs' argument that *In re Sharp* and its progeny is limited to secured creditors. *See Lerner v. Fleet Bank, N.A.*, 459 F. 3d at 295.

Further, plaintiffs' reliance on *Aviles v. S&P Global, Inc.*, 380 F. Supp. 3d 221 (S.D.N.Y. 2019) and *Barnet v. Drawbridge Special Opportunities Fund LP,* No. 14-cv-1376 (PKC), 2014 U.S. Dist. LEXIS 124410 (S.D.N.Y. Sept. 5. 2014), is misplaced. First, both cases involved secured creditors that demanded repayment of an outstanding debt. Second, the question before

the Court was whether the plaintiffs had alleged that the defendants did more than just make a mere demand for repayment. Neither case involved an analysis of the "duty" required to find the substantial assistance element of an aiding and abetting claim.

The SAC does not allege that Mr. Gerszberg did more than negotiate against an adverse party for terms that were of benefit to him. The question before the Court is therefore whether under New York law, knowledge of the alleged wrongdoing by the PPVA insiders imposed a duty on Mr. Gerszberg to consider PPVA's interests during the negotiation of the transactions. Case law is clear that it does not. *See In re Sharp*, 403 F.3d at 53. Accordingly, this Court should reject Plaintiffs' narrow reading of *In re Sharp* and reconsider its June 21 Order.

II. 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, dismiss the Second Amended Complaint as against Mr. Gerszberg.

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EPSTEIN OSTROVE, LLC
Attorneys for Defendant, Seth Gerszberg

By: s/ Elliot D. Ostrove
ELLIOT D. OSTROVE

200 Metroplex Drive, Suite 304
Edison, New Jersey 08817

and

43 West 43rd Street, Suite 139
New York, NY 10036
Telephone: (732-828-8600
Attorneys for Defendant, Seth Gerszberg