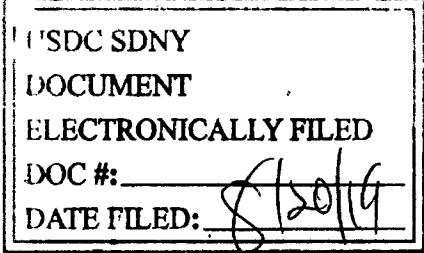


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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In re PLATINUM-BEECHWOOD LITIGATION :	:	18-cv-6658 (JSR)
-----	X	
MARTIN TROTT and CHRISTOPHER SMITH, :	:	
as Joint Official Liquidators and :	:	
Foreign Representatives of PLATINUM :	:	
PARTNERS VALUE ARBITRAGE FUND L.P. :	:	18-cv-10936 (JSR)
(in Official Liquidation), and :	:	
PLATINUM PARTNERS VALUE ARBITRAGE :	:	<u>MEMORANDUM ORDER</u>
FUND L.P. (in Official :	:	
Liquidation), :	:	
	:	
Plaintiffs, :	:	
	:	
-v- :	:	
	:	
PLATINUM MANAGEMENT (NY) LLC, et :	:	
al., :	:	
	:	
Defendants. :	:	
-----	X	



JED S. RAKOFF, U.S.D.J.

The relevant background to this case has been set forth in various Opinions and Orders of this Court, familiarity with which is here assumed. See In re Platinum-Beechwood Litig., No. 18-cv-6658 (JSR), 2019 WL 2569653 ("June 21 Opinion and Order"), at *1-2 (S.D.N.Y. June 21, 2019) ; In re Platinum-Beechwood Litig., No. 18-cv-6658 (JSR), 2019 WL 1570808, at *2-7 (S.D.N.Y. Apr. 11, 2019).

In the June 21 Opinion and Order, this Court, inter alia, dismissed the Fourteenth Count (unjust enrichment) of the Second Amended Complaint by Plaintiffs against Gerszberg only insofar as it relates to the Spectrum30 Loan, but otherwise denied

Gerszberg's motion to dismiss the Fourteenth Count and the Thirteenth Count (aiding and abetting breach of fiduciary duty). In re Platinum-Beechwood Litig., 2019 WL 2569653, at *15.

Now before the Court is Gerszberg's motion for reconsideration of the portion of this Court's Opinion and Order that denied in part his motion to dismiss. ECF No. 427. For the reasons below, the Court denies his motion for reconsideration.

Analysis

The standard for granting a motion for reconsideration "is strict, and reconsideration will generally be denied 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." Shrader v. CSX Transp. Inc., 70 F.3d 255, 257 (2d Cir. 1995).¹ This standard is intended to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." Carolco Pictures Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988). Accordingly, "[a] motion for reconsideration should be granted only when the [moving party]

¹ Unless otherwise indicated, in quoting cases all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr., 729 F.3d 99, 104 (2d Cir. 2013).

In his motion for reconsideration, Gerszberg does not offer any reason as to why this Court should reconsider its decision not to entirely dismiss the Fourteenth Count. Therefore, Gerszberg’s motion for reconsideration as it relates to this Court’s decision regarding the Fourteenth Count is denied.

As to the Thirteenth Count, the Court, having found that the knowledge element of the aiding and abetting claim was well pled, stated in the June 21 Opinion and Order that “the SAC adequately alleges that 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 Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, or the Spectrum30 Loan would have happened without him.” In re Platinum-Beechwood Litig., 2019 WL 2569653, at *14 (emphasis added).

The main thrust of Gerszberg's motion is that, in the June 21 Opinion and Order, "the Court overlooked controlling case law with respect to the substantial assistance element of the claims made against Mr. Gerszberg." ECF No. 428 ("Gerszberg Memo"), at 1 (referring to In re Sharp Int'l Corp., 403 F.3d 43 (2d Cir. 2005)). In Sharp, a bankruptcy trustee sued State Street Bank and Trust Company ("State Street") – a secured creditor of the bankrupt debtor Sharp International Corporation ("Sharp") – alleging that State Street had been aware of Sharp's involvement in internal corporate fraud but nonetheless consented to Sharp borrowing money from other unsuspecting creditors so that State Street would be repaid on its secured loan. Sharp, 403 F.3d at 46-49. The Second Circuit dismissed the claim for aiding and abetting breach of fiduciary duty against State Street, holding that State Street did not provide "substantial assistance" when it "relied on its own wits and resources to extricate itself from peril" and that State Street "had no duty to warn" other unsuspecting creditors. Id. at 51, 53.

Gerszberg states that the "law is clear" based on Sharp: "absent a showing that Mr. Gerszberg owed a duty to PPVA, any claim that he substantially assisted the PPVA insiders must fail." ECF No. 446 ("Gerszberg Reply"), at 2. In other words,

Gerszberg argues, because the Sharp court dismissed the plaintiffs' claim against State Street for failing to "identify any duty on the Defendant's part to precipitate its own loss in order to protect lenders that were less diligent," this Court should have analyzed whether Gerszberg owed any duty to PPVA before holding that he offered "substantial assistance."

Gerszberg Memo 5, 6.

Gerszberg's view above is a misstatement of law and a misreading of Sharp. As Sharp states, under New York law, the elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) "a breach by a fiduciary of obligations to another," (2) "that the defendant knowingly induced or participated in the breach," and (3) "that plaintiff suffered damage as a result of the breach." Sharp, 403 F.3d at 49 (citing Kaufman v. Cohen, 307 A.D.2d 113, 125 (1st Dep't 2003)); see also Lerner v. Fleet Bank, N.A., 459 F.3d 273, 294 (2d Cir. 2006). As to the second element, "[a] person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator." Lerner, 459 F.3d at 294. With the exception of cases of omission or failure to act, as discussed below, it is not an element of a claim for aiding and abetting breach of fiduciary duty that the

defendant must himself owe fiduciary duty to the plaintiff, separate from the duty owed by a fiduciary to the plaintiff.

Contrary to such well-established law, Gerszberg seems to suggest that the defendant's duty to the plaintiff is a necessary element of a claim for aiding and abetting breach of fiduciary duty, based on the following sentence from Sharp: "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." Gerszberg Reply 2 (citing Sharp, 403 F.3d at 50) (emphasis added by Gerszberg); see also Gerszberg Memo 3, 6. However, Gerszberg's reading is incorrect if he thinks that "when required to do so" (i.e., when the defendant owes duty to the plaintiff) applies to all of "affirmatively assists, helps conceal or fails to act." To the contrary, "when required to do so" modifies only "fails to act," as the Sharp court itself discussed. Sharp, 403 F.3d at 51-52. This reading is consistent with the well-known principle that the inaction of an aider and abettor is actionable only when the aider and abettor has an affirmative duty to act or has a fiduciary duty to the plaintiff. See, e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 446 F. Supp. 2d 163, 203

(S.D.N.Y. 2006). Furthermore, reading it otherwise - e.g., "substantial assistance may only be found where the alleged aider and abettor helps conceal when required to do so" - does not make much sense. Here in the present case, Gerszberg is alleged, inter alia, to have caused West Loop and Epocs to obtain interest as "lenders" in the amount of \$5 million "even though they never provided any loan funds to PPVA or any company affiliated with PPVA," "drafted the Forbearance and Security Agreement for the sole benefit of West Loop/Epocs, and to the detriment of PPVA," and "caused PPVA to transfer a substantial portion of the limited cash PPVA received from the Agera Sale to Gerszberg and Zapata" - all of which are affirmative actions, rather than failures to act - so it is irrelevant whether he owed any duty to PPVA. ECF No. 285 ("SAC") ¶¶ 740, 749, 758. In sum, Gerszberg misreads Sharp and misstates the elements of a claim for aiding and abetting breach of fiduciary duty.

In addition, this Court finds the present case distinguishable from Sharp for a few reasons. In Sharp, State Bank was alleged to have known Sharp's falsified business records but was not alleged to have participated in perpetuating such falsification. Sharp, 403 F.3d at 46-49. In contrast, according to the allegations in the SAC, Gerszberg was not only

aware that the Platinum defendants would breach their fiduciary duty through the allegedly fraudulent transactions, but also himself actively caused, facilitated, and executed those transactions, such as drafting of the Forbearance and Security Agreement or causing a PPVA subsidiary to transfer \$15 million of Agera sale proceeds to Gerszberg and a Gerszberg-controlled entity called Spectrum30 for no consideration. SAC ¶¶ 746-50, 752-58.

Moreover, in Sharp, there were five alleged "acts" by State Street that were the basis of the claim for aiding and abetting breach of fiduciary duty. Sharp, 403 F.3d at 46-49. Three of these alleged "acts" were omissions and failures to act, which, for the reasons stated above, are not relevant to the present case involving Gerszberg's affirmative actions. Id. at 51-52. Another alleged "act" by State Street was its demand for repayment from Sharp, where the Second Circuit held that "the demand for repayment of a bona fide debt did not constitute a corrupt inducement to establish aiding and abetting liability." Sharp, 403 F.3d at 51. This is also not applicable to the present case, because State Street had prior contractual rights to demand money that Sharp owed, whereas, as Plaintiffs point out in their opposition brief, Gerszberg was not exercising his

preexisting rights to rescue himself but rather was entering into entirely new transactions with PPVA entities that owed him no prior contractual obligation. ECF No. 573, at 13-14. The fifth alleged "act" by State Street was granting Sharp its express consent to the refinancing, which the Second Circuit said was "affirmative" but "did no more than remove a contractual impediment that was reserved to State Street to invoke or not in its own interest." Sharp, 403 F.3d at 52. The degree of Gerszberg's involvement in the allegedly fraudulent transactions - the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, and the Spectrum30 Loan - is far greater than State Street's mere removal of "a contractual impediment." SAC ¶¶ 736-57.

For all of the above reasons, this Court finds that Gerszberg does not 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." Shrader v. CSX Transp. Inc., 70 F.3d 255, 257 (2d Cir. 1995). Gerszberg's motion for reconsideration of this Court's decision not to dismiss the Thirteenth Count is therefore denied.

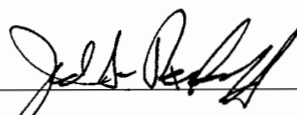
Conclusion

For the foregoing reasons, the Court denies Gerszberg's motion for reconsideration in its entirety.

The Clerk is directed to close the entry at docket number 427 in 18-cv-10936.

SO ORDERED.

Dated: New York, NY
August 18, 2019



JED S. RAKOFF, U.S.D.J.