UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Case No. 18 Civ. 6658 (JSR)
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 Civ. 10936 (JSR)

DEFENDANT DANIEL SAKS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 4

I. BACKGROUND 4

II. SAKS' EMPLOYMENT AT PLATINUM MANAGEMENT 4

III. SAKS' EMPLOYMENT AT BEECHWOOD 5

IV. THE MONTSANT TRANSACTION 5

PROCEDURAL HISTORY 7

ARGUMENT 9

I. PPVA HAS NOT ADDUCED CLEAR AND CONVINCING EVIDENCE OF SAKS' ACTUAL KNOWLEDGE OF THE FIRST SCHEME 10

A. Subordination of PPVA's Rights in "Common Collateral" to Beechwood's 11

B. Allowing Platinum Insiders and Certain Investors to Profit from the Sale of Black Elk Assets 12

C. Inflation of Valuations to Obtain Greater Management Fees 14

II. PPVA HAS NOT ADDUCED EVIDENCE THAT SAKS SUBSTANTIALLY ASSISTED THE FIRST SCHEME THROUGH HIS PARTICIPATION IN THE MONTSANT TRANSACTION 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 9

Armstrong v. McAlpin,
699 F.2d 79 (2d Cir. 1983) 16

Chemtex LLC v. St. Anthony Enters., Inc.,
490 F. Supp. 2d 536 (S.D.N.Y. 2007) 10, 13, 14

Diduck v. Kaszycki & Sons Contractors, Inc.,
974 F.2d 270 (2d Cir. 1992) 14

Franco v. English,
210 A.D.2d 630 (3d Dep't 1994) 14

Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt.,
479 F. Supp. 2d 349 (S.D.N.Y. 2007) 11

Hongying Zhao v. JPMorgan Chase & Co.,
No. 17 Civ. 8570, 2019 WL 1173010 (S.D.N.Y. Mar. 13, 2019) 10

In re Sharp Int'l Corp.,
403 F.3d 43 (2d Cir. 2005) 17

Kirschner v. Bennett,
648 F. Supp. 2d 525 (S.D.N.Y. 2009) 10

Kolbeck v. LIT Am., Inc.,
939 F. Supp. 240 (S.D.N.Y. 1996) 10

Krys v. Pigott,
749 F.3d 117 (2d Cir. 2014) 14

Lerner v. Fleet Bank N.A.,
459 F.3d 273 (2d Cir. 2006) 9, 10

Mazzaro de Abreu v. Bank of Am. Corp.,
812 F. Supp. 2d 316 (S.D.N.Y. 2011) 11, 13

Morin v. Trupin,
711 F. Supp. 97 (S.D.N.Y. 1989) 16

Nathel v. Siegal,
592 F. Supp. 2d 452 (S.D.N.Y. 2008) 13

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC,
446 F. Supp. 2d 163 (S.D.N.Y. 2006) 15

Primavera Familienstifung v. Askin,
130 F. Supp. 2d 450 (S.D.N.Y. 2001) 9

Rules

Fed. R. Civ. P. 56 1

Defendant Daniel Saks ("Saks") respectfully submits this memorandum of law in support of his Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as to claims filed against him by Plaintiffs Martin Trott and Christopher Smith, in their capacity as Joint Official Liquidators of Platinum Partners Value Arbitrage Fund L.P. ("PPVA" and collectively, "Plaintiffs").

PRELIMINARY STATEMENT

At the end of 2013, Saks was approached by his childhood friend, Mark Nordlicht, with an opportunity to join a billion-dollar hedge fund, Platinum Management. Saks left another fund that he had helped to found and began at Platinum in March 2014. However, by July 2014, he had already given notice of his departure. In September 2014, Saks was given the opportunity to serve as a portfolio manager, and then as chief investment officer for structured products, for Beechwood and its clients. Saks stayed at Beechwood only through the end of 2015, leaving the company on December 31, 2015.

Saks, like many other individuals involved with Platinum and Beechwood, now faces this action brought by PPVA. Unlike many others, however, Saks had no substantive role in the alleged conduct and transactions that PPVA contends form the basis for liability. In the initial stages of this case the majority of PPVA's claims against Saks were dismissed, including all claims alleged against him as a "Platinum Defendant." However, Saks remained as a "Beechwood Defendant" for supposed aiding and abetting liability based solely on his alleged role in the "Montsant transaction," a January 2015 senior secured loan made by Beechwood to Platinum on behalf of Beechwood's client Senior Health Insurance Company of Pennsylvania ("SHIP"). Now that discovery has been completed, these claims too cannot survive. At the dismissal stage, this Court determined that it was bound to accept as true PPVA's allegation in

the SAC that Saks "knowingly participated in the Platinum Defendants' tortious conduct" because he moved from Platinum to Beechwood and then "helped orchestrate" the Montsant transaction. *See* Decl. of Wendy H. Schwartz ("Schwartz Decl."), Ex. 3, Opinion and Order dated June 21, 2019, ECF No. 408 ("June Op. & Order") at 63-64 and Opinion and Order dated April 11, 2019, ECF No. 225 ("April Op. & Order") at 56-57. However, the material undisputed facts adduced through discovery show there is no evidentiary support for the assertion of knowing participation or substantial assistance arising from Saks' role in the Montsant transaction.

First, there is no material issue of fact that would permit a jury to find actual knowledge by Saks that the Montsant transaction was part of the allegedly fraudulent First Scheme set forth in the Second Amended Complaint (the "SAC"). PPVA's position appears to be that Saks' prior employment with Platinum, his seniority at Beechwood and his oversight of its senior secured loans meant that at the time of the Montsant transaction he either must have known or could have discovered that Montsant was part of the alleged First Scheme. But courts explicitly reject the notion that constructive knowledge, notice, or even the observation of "red flags" (which did not exist for Saks in connection with Montsant) form a sufficient basis for aiding and abetting liability. Rather, the defendant must have *actually* known that a fraud or breach of duty was occurring. The material undisputed facts developed during discovery are to the contrary. For example, there is no basis to assert that Saks knew the Montsant transaction was a front to funnel assets to Platinum and Beechwood insiders -- if Montsant defaulted on the loan made to it, the collateral pledged by Platinum and the personal guarantee by Nordlicht and his wife would have gone to benefit SHIP, Beechwood's client. Nor can it be inferred that Saks actually knew that the Montsant transaction was an alleged fiction designed to unwind the alleged Black Elk

Scheme. Saks was asked to sign the Montsant transaction documents on behalf of B Asset Manager ("BAM"), but not asked to sign the Black Elk bond sale documents on behalf of BAM the same day. Saks only learned about the Black Elk transaction afterwards, when he was told to inform CNO Financial Group ("CNO"), a Beechwood client that had asked to divest its Platinum-related assets. From Saks' perspective, each of these transactions was for the benefit of a Beechwood client. Discovery has adduced no evidence to suggest he had any knowledge beyond that.

Second, there is no material issue of fact that would permit a jury to find that Saks substantially assisted the First Scheme through his participation in the Montsant transaction. Saks did not come up with the idea for the transaction, he did not negotiate the transaction, and he only began to be copied on emails very shortly before it closed. Saks executed the transaction documents because he was the authorized signatory for BAM, signing as agent for SHIP pursuant to the Beechwood-SHIP Investment Management Agreement. He also summarized the deal terms internally as he did for all structured transactions at Beechwood, and he later reviewed the collateral for compliance with the terms of the deal.

Saks' signature on the Montsant transaction documents as authorized signatory for the company, and his internal routine cataloguing of the terms does not come close to the level of "substantial assistance" necessary to support a claim of aiding and abetting an allegedly fraudulent scheme. Indeed, given that Saks was a Beechwood employee who owed no fiduciary duties to PPVA investors at the time of the Montsant transaction, the law imposes no duty on Saks to detect and correct the alleged fraudulent activity of others. Moreover, Saks' signature on the Montsant transaction documents in early 2015 cannot be considered a proximate cause of harm to PPVA investors when the fund failed in 2016 (after Saks' departure) given the number

of other issues that befell Platinum in between that transaction and the ultimate injury alleged by PPVA's investors.

STATEMENT OF FACTS

I. BACKGROUND

Saks is an attorney by training, with JD and MBA degrees from New York University, who has worked as an investment professional for over 20 years. Schwartz Decl. Ex. 4, Saks Tr. at 15:7-25. Following his graduation from law school, Saks worked as a corporate finance associate at Skadden Arps. *Id.* at 16:18-17:6. Since 1997, Saks has worked in an investment capacity, Statement of Material Facts ("SMF") ¶ 1.

In 1997, Saks worked as managing member at a firm called West End Capital that focused on convertible preferred investments and other privately negotiated private placements, Schwartz Decl. Ex. 4, Saks Tr. at 17:11-18:11. Saks started the fund along with three childhood friends, including Mark Nordlicht. *Id.* at 19:21-24; 21:10-22:15. Nordlicht left West End Capital in 2001 to pursue other ventures. *Id.* at 20:6-13. In 2003, Saks moved to DKR Oasis, a multi-strategy hedge fund, where he continued to invest in privately placed securities, convertible preferred and debt, and discounted common stock. *Id.* at 18:12-19:6. In 2007, Saks started another fund called Genesis Capital Advisors, where he continued to make the same types of investments until his departure at the end of 2013. *Id.* at 19:7-14; 29:22-23.

II. SAKS' EMPLOYMENT AT PLATINUM MANAGEMENT

At the end of 2013, Nordlicht pitched Saks on joining Platinum Management, and Saks began working there in March 2014. SMF ¶¶ 2, 4. Saks was persuaded to join Platinum because he had known Nordlicht for a long time and from the outside it appeared that Platinum was a very successful fund that could be a good platform. *Id.* ¶ 3. During his tenure at Platinum, Saks was paid a flat monthly amount as a 1099 contractor. *Id.* ¶ 5. Saks was intended to eventually

receive equity in Platinum, but that did not occur. *Id.* In July 2014, Saks gave notice that he would be leaving Platinum, and he left in September 2014. *Id.* ¶ 6.

III. SAKS' EMPLOYMENT AT BEECHWOOD

After Saks provided notice that he would be leaving Platinum, Saks interviewed with Scott Taylor and Mark Feuer and was hired as a portfolio manager at BAM, the investment arm of Beechwood, and started work there in September 2014. SMF ¶ 7. In late 2014, Levy, who at the time was chief investment officer of BAM, left Beechwood and Saks was promoted to the position of chief investment officer for structured products.[1] *Id.* ¶ 9. Saks was also given the title of President "specifically for the purpose of signing" documents on behalf of BAM. *Id.* ¶ 10. Saks received a flat monthly amount as compensation, without any bonus. *Id.* ¶ 8.

At Beechwood, Saks signed many transactions as authorized signatory for BAM, whether or not they were his. In his capacity as signatory, he would sign documents that were presented to him but did not necessarily review the deals that he was not personally working on *Id.* ¶ 11. This is distinct from the transactions for which Saks was specifically responsible, for which he would review the deal terms. *Id.* ¶ 12. Saks remained at Beechwood through the end of 2015, when he resigned effective December 31, 2015. *Id.* ¶ 29.

IV. THE MONTSANT TRANSACTION

The sole basis for liability upon which Saks has been held in this case involves a transaction with Montsant Partners LLC ("Montsant"), described in the SAC as the Montsant transaction. Schwartz Decl. Ex. 1, Second Am. Compl. ("SAC") ¶ 192. The Montsant transaction was a loan of $35.5 million made by BAM, on behalf of its client SHIP, to Montsant,

---

[1] Stewart Kim was the chief investment officer for other investments at Beechwood. SMF ¶ 9.

a subsidiary of Platinum, on January 30, 2015. *See* SMF ¶ 13. BAM acted as administrative agent for SHIP in the loan and Saks signed the document as authorized signatory for BAM. *Id.* ¶ 14. Platinum and its principals provided two levels of security for the loan: (1) Nordlicht and his wife provided a personal guarantee on the loan note; and (2) Montsant placed into a collateral account certain securities with value greater than or equal to twice the value of the loan. *See id.* ¶¶ 15, 21(c).

Although Saks executed the transaction documents as BAM's representative, he did not design, structure, or negotiate the transaction. *Id.* ¶ 16. Christian Thomas—Beechwood's in-house attorney—sent the emails negotiating the terms of the transaction on behalf of Beechwood. *Id.* ¶ 17. No emails or testimony reflect any input from Saks into the terms of the transaction. Saks received a description of the Montsant transaction from Feuer, Taylor, and Thomas, who asked Saks to sign the transaction documents on behalf of BAM. *Id.* ¶ 18. Saks prepared an investment memorandum to memorialize the transaction prior to closing, as was customary for his role. *Id.* ¶ 19. His memorandum incorrectly stated the details of the transaction, including the amount of the loan, and needed to be corrected by Moti Edelstein, an employee in Beechwood's back office. *Id.* ¶ 20.

The only other involvement by Saks in the Montsant transaction was reviewing the collateral identified by Platinum for compliance with the terms of the contract. On January 20, 2015, Saks had sent an email to Levy at Platinum asking to set up a phone call. *Id.* ¶ 21(a). Levy responded that Platinum would be meeting internally to develop a list of collateral. *Id.* There are no emails or testimony regarding any actual conversation between Levy and Saks at that time, and Saks does not recall any such conversation occurring. *Id.*

After execution of the Montsant transaction, Thomas followed up on the collateral to be posted, with Saks in copy. *Id.* ¶ 21(b). These email communications confirm that it was Platinum who decided which securities to place into the Montsant collateral account, with Beechwood, including Saks, determining whether the collateral met the terms of the contract. *Id.* Collateral for the Montsant transaction was finalized in May 13, 2015, when the Montsant Pledge Agreement was signed. *Id.* ¶ 21(c).

Following the close of the Montsant transaction, Saks was informed by Feuer and Taylor that Platinum had used the Montsant proceeds to repurchase Black Elk bonds from Beechwood and its clients, including reinsurance trusts of CNO. *Id.* ¶ 26. Saks was not aware in advance that this was going to occur. *Id.* ¶ 25. Although the sale of the Black Elk bonds was addressed to BAM—and thus in the ordinary course could have been signed by Saks—the sale agreement was addressed to Thomas and signed by Feuer. *Id.* ¶¶ 23-24. There are no emails or testimony to show any involvement by Saks in the January 2015 Platinum purchase of the Black Elk bonds. *Id.* ¶ 24.

CNO had previously expressed a desire for Beechwood to divest CNO's Platinum investments. *Id.* ¶ 28. Feuer and Taylor asked Saks to let Eric Johnson at CNO know that CNO's reinsurance trusts had been divested of Black Elk, which Saks did. *Id.* ¶¶ 26, 27.

PROCEDURAL HISTORY

PPVA filed this action in November 2018. *See* ECF No. 1, Complaint. In its initial Complaint, PPVA named Saks as a "Beechwood Defendant" and alleged claims against him (as a member of the group of "Beechwood Defendants") for aiding and abetting breach of duty and fraud, unjust enrichment, and civil RICO. *See id.* The initial Complaint also made separate allegations against a group of "Platinum Defendants" that did not include Saks. The Second

Amended Complaint ("SAC"), filed in March 2019, added Saks as a Platinum Defendant, which had the effect of asserting additional claims against him for breaches of fiduciary duty, common-law fraud, constructive fraud, and additional aiding and abetting counts in Saks' capacity as a Platinum Defendant; the SAC also added an additional claim of civil conspiracy against the Beechwood Defendants, including Saks. *See* Schwartz Decl. Ex. 1, SAC.

With respect to the aiding and abetting claims, PPVA set forth in the SAC two alleged fraudulent schemes that it also contends are breaches of fiduciary duties to investors in the fund. According to PPVA, the "First Scheme" was a "series of non-commercial transactions" with a goal toward: (1) "falsely inflat[ing] the net value ascribed to PPVA's assets, thereby enabling Platinum Management to collect unearned partnership shares/fees"; (2) "subordinating PPVA's prior rights in common collateral to those of the Beechwood Entities"; and (3) "enabl[ing] Platinum Management insiders, friends and designated investors/creditors to take proceeds from the sale of assets of PPVA's largest investment," Black Elk, to the detriment of PPVA itself. *Id.* ¶ 9. According to PPVA, the "Second Scheme" began in "late 2015" and allegedly consisted of a conspiracy to "transfer or encumber all or nearly all of PPVA's remaining assets for the benefit of the Beechwood Defendants, select insiders, and [PPCO]." *Id.* ¶ 10.

Following two rounds of briefing on motions to dismiss, the Court entered two orders that on a combined basis dismissed all of the claims against Saks except the aiding and abetting claims against him in his capacity as a Beechwood Defendant. *See* June Op. & Order at 4-5; April Op. & Order at 4. The Court allowed the aiding and abetting claims to remain based on Saks' alleged involvement in the Montsant transaction. Specifically, the Court held that at the dismissal stage, it was bound to accept as true the SAC allegation that Saks "knowingly participated in the Platinum Defendants' tortious conduct" because Saks had moved from

Platinum to a high ranking position at Beechwood and then "helped orchestrate" the Montsant transaction, and that substantial assistance could likewise be inferred from the Montsant transaction. *See* June Op. & Order at 59, 63-64; April Op. & Order at 56-57; SAC ¶¶ 192, 526 & Ex. 65.

After approximately a six-month period of discovery, including the production of millions of documents and dozens of depositions, Saks moves for summary judgment on the aiding and abetting claims against him.

LEGAL STANDARD

PPVA has the burden of proving claims for aiding and abetting fraud and breach of fiduciary duty by "clear and convincing evidence." *See, e.g.*, *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 488 (S.D.N.Y. 2001). Given the heightened standard that applies to these fraud-based claims, PPVA is required to adduce sufficient evidence to meet that standard at the summary judgment stage, as well as at trial. *See id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

ARGUMENT

The two claims that remain against Saks are identical, and summary judgment is appropriate as to each for the same reasons. Aiding and abetting liability requires "(1) the existence of a fraud [or breach of duty]; (2) [the] defendant's knowledge of the [violation]; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *Lerner v. Fleet Bank N.A.*, 459 F.3d 273, 292 (2d Cir. 2006). Courts have consistently held that claims of aiding and abetting fraud and breach of duty are indistinguishable where, as here, the conduct underlying both claims is the same. *See, e.g.*, *Hongying Zhao v. JPMorgan Chase &*

Co., No. 17 Civ. 8570, 2019 WL 1173010, at *5 n.6 (S.D.N.Y. Mar. 13, 2019); *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 533 (S.D.N.Y. 2009).

Because PPVA has failed to adduce clear and convincing evidence of either actual knowledge or substantial assistance by Saks, and there are no material facts in dispute on these issues, summary judgment is appropriate. As an initial matter, Saks could not have aided and abetted the execution of the Second Scheme as all of the alleged component transactions occurred in 2016, after Saks had left employment at Platinum and Beechwood. As to the First Scheme, the only action pleaded as to Saks was his alleged involvement in "orchestrating the January 2015 Montsant transaction." SAC ¶ 192. However, no facts have been developed to show that Saks had actual knowledge of a fraudulent scheme and understood the role that the Montsant transaction played in that scheme, and no facts have been developed to show that Saks "orchestrated" any component of the Montsant transaction that furthered the alleged fraud or proximately caused the harm alleged by PPVA. Rather, the material undisputed facts show exactly the opposite.

I. PPVA HAS NOT ADDUCED CLEAR AND CONVINCING EVIDENCE OF SAKS' ACTUAL KNOWLEDGE OF THE FIRST SCHEME

No facts support Saks' knowledge of an underlying fraud or breach of duty—which here must come from the First Scheme since the Second Scheme post-dates him—and thus he is entitled to summary judgment on the aiding and abetting claims. Under New York law, as interpreted in the Second Circuit, "actual knowledge is required to impose liability on an aider and abettor." *Lerner*, 459 F.3d at 292 (quoting *Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y. 1996)). "The burden of demonstrating actual knowledge, although not insurmountable, is nevertheless a heavy one." *Chemtex LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 546 (S.D.N.Y. 2007) (quoting *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt.*,

479 F. Supp. 2d 349, 367 (S.D.N.Y. 2007)). Specifically, although actual knowledge may be inferred from circumstantial evidence, mere "constructive knowledge," indicia of "recklessness," or even "willful blindness" are insufficient to create a dispute of material fact as to actual knowledge. *See Mazzaro de Abreu v. Bank of Am. Corp.*, 812 F. Supp. 2d 316, 322-23 (S.D.N.Y. 2011) (collecting cases).

The facts do not support Saks' knowledge of any of the subsidiary components of the First Scheme, nor how his alleged involvement in orchestrating the Montsant transaction would have fit together with the alleged First Scheme to the detriment of PPVA.

A. Subordination of PPVA's Rights in "Common Collateral" to Beechwood's

First, regarding the allegation that Platinum and Beechwood subordinated "PPVA's prior rights in common collateral to those of the Beechwood Entities," no adduced facts suggest Saks was actually aware of any such transactions during his time of employment at Platinum and Beechwood, let alone that such transactions were fraudulent. To the extent that this allegation purports to refer to the Montsant transaction, it does not meet the criteria described for several reasons.

First, to the extent Montsant defaulted on the loan made to it, the collateral would have inured to the benefit of SHIP, and not to the Beechwood Entities or, in turn, Beechwood's principals. This is because the Montsant transaction was made on behalf of SHIP; BAM simply acted as the administrative agent for SHIP under the IMAs and acquired none of its own interests through the transaction. SMF ¶¶ 13-14. Thus, to the extent PPVA alleges that the fraud was to enrich the owners of Beechwood at the expense of PPVA by transferring beneficial interests in collateral to Beechwood, the Montsant transaction did not accomplish that goal.

Second, to the extent the transaction was purportedly fraudulent because it resulted in the extraction of value from PPVA for the ultimate benefit of Platinum executives, Nordlicht

provided a personal guarantee of the note. *Id.* ¶ 15. Thus, in the event of default, Nordlicht's own wealth would have been in direct jeopardy.

Third, there were no indicia available to Saks that, at the time of the transaction, Montsant and Platinum did not intend to or could not meet their obligations under the Montsant note—the only way in which the collateral pledged in the transaction would have been jeopardized. No documents or testimony adduced through discovery would have provided any indication to Saks that the Montsant note would not be repaid.

B. Allowing Platinum Insiders and Certain Investors to Profit from the Sale of Black Elk Assets

Second, the evidence adduced by PPVA does not establish by clear and convincing evidence that Saks understood at the time of execution that the Montsant transaction would assist in "unwinding the Black Elk Scheme," as the Court wrote in its June Opinion and Order (at 64). As an initial matter, PPVA has adduced no evidence that Saks had knowledge of or involvement in the alleged Black Elk Scheme, and thus he could not have appreciated that the Montsant transaction was assisting in unwinding a fraud. However, even if Saks *had* acquired actual knowledge of the Black Elk Scheme, summary judgment would still be appropriate, because the undisputed evidence shows that Saks did not have actual knowledge that the Montsant transaction was "unwinding the Black Elk Scheme" at the time the transaction closed. As discussed in further detail below (at 15-16), Saks did not negotiate the Montsant transaction, which was handled primarily by Christian Thomas. Rather, Saks was copied on emails regarding the Montsant transaction only in the couple of days leading up to the execution of the transaction documents, as Saks was required to sign the documents as the authorized signatory and President of BAM. SMF ¶ 17. In the investment memorandum Saks prepared to summarize the Montsant transaction prior to closing, Saks was incorrect about key details of the transaction, such as the

transaction amount. *Id.* ¶¶ 19-20. As part of that memorandum, Saks described the purpose of the transaction only to allow Montsant to "purchase stock and debt from Platinum Partners the value of which will be in excess of 2 times the facility amount." *Id.* Saks did not learn until after the close of the transaction, from Mark Feuer and Scott Taylor, that Platinum used the proceeds to buy back Black Elk bonds from Beechwood. *Id.* ¶¶ 25-26. Saks' testimony that he did not know about the imminent sale of the Black Elk bonds is supported by the documents, which show that Saks was not involved in the sale of the Black Elk bonds back to Platinum. Although the sale of the Black Elk bonds was addressed to BAM—and thus could have been signed by Saks—the sale agreement was sent to the attention of Christian Thomas and signed by Mark Feuer. *See Id.* ¶¶ 22-23.

At most PPVA can argue that Saks must have seen warning signs by virtue of his positions at Platinum and Beechwood. But such innuendos alone would not be enough to survive summary judgment at any applicable standard, let alone establish clear and convincing evidence of actual knowledge. Courts have held again and again that a defendant's "alleged ignorance of obvious warning signs of fraud" or failure to heed "red flags" do not suffice to support a claim of aiding and abetting. *Chemtex*, 490 F. Supp. 2d at 547; *Mazzaro de Abreu*, 812 F. Supp. 2d at 323; *Nathel v. Siegal*, 592 F. Supp. 2d 452, 469 (S.D.N.Y. 2008). Thus, there is no basis for the aiding and abetting claim against Saks to proceed.

C. Inflation of Valuations to Obtain Greater Management Fees

Finally, there is no nexus between the inflation of the net asset values of PPVA and Saks' alleged role in orchestrating the Montsant transaction, and thus any knowledge[2] regarding this aspect of the First Scheme would be irrelevant to Saks. Aiding and abetting requires a "nexus between the primary fraud, [the alleged aider and abettor's] knowledge of the fraud, and what [the alleged aider and abettor] did with the intention of advancing the fraud's commission." *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014) (alterations in original) (quoting *Franco v. English*, 210 A.D.2d 630, 633 (3d Dep't 1994)). The Montsant transaction did not implicate Platinum's valuation of its own assets, and thus such knowledge could not translate to a claim of aiding and abetting based on alleged participation in the Montsant transaction.

II. PPVA HAS NOT ADDUCED EVIDENCE THAT SAKS SUBSTANTIALLY ASSISTED THE FIRST SCHEME THROUGH HIS PARTICIPATION IN THE MONTSANT TRANSACTION

Similarly, PPVA has not developed facts to support their allegation that Saks substantially assisted the First Scheme through his involvement in the Montsant transaction. A defendant is consisted to have substantially assisted a primary violation only if he "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables [a violation] to proceed." *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 284 (2d Cir. 1992). Whether a defendant's actions rise to the level of substantial assistance may also be equated to the concept of proximate cause of harm to the plaintiff. *See Chemtex*, 490 F. Supp. 2d at 547;

---

[2] The Court in the June Opinion and Order dismissed claims against Saks for aiding and abetting in his capacity as a Platinum Defendant, including the claims related to the improper inflation of net asset value of PPVA investments. *See* June Op. & Order at 62-63. In any event, no evidence has been adduced in discovery that Saks was involved in the valuation of PPVA investments, nor that he had knowledge of the inflation of net asset values, and even if it had been, it would not be permitted to be used since it was not alleged in the SAC. *See* June Op. & Order at 34 n.11.

Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 446 F. Supp. 2d 163, 202 (S.D.N.Y. 2006).

Although PPVA alleges a number of components to the First Scheme, the only one that PPVA may proceed against Saks on is the Montsant transaction. The material undisputed facts adduced in discovery show that Saks' conduct does not rise to the level of substantial assistance of an alleged fraud. No evidence shows that Saks was involved in the initial idea behind the transaction. No evidence shows that Saks was involved in any discussions structuring or designing the transaction. No evidence shows that Saks played any role in negotiating the transaction. No evidence shows that Saks chose the collateral that would be pledged under the transaction.

Saks' role was limited and necessitated by his position at Beechwood, particularly his role as authorized signatory for BAM. The Montsant transaction occurred on January 30, 2015. SMF ¶ 13. Saks began to be copied on emails circulating draft documents for the Montsant transaction only at the point where such documents were already close to being signed, at Saks was the signatory. *Id.* ¶ 17. The only mention of "Montsant" to Saks prior to the couple of days leading up to the transaction occurred on January 20, 2015, when David Levy and Saks emailed to set up a potential telephone call following an internal Platinum meeting "to get a list of collateral." *Id.* ¶ 21(a). Saks has no recollection of any such call occurring. *Id.* The Montsant Pledge Agreement was finally signed in May 2015, three and a half months after the underlying transaction occurred. *Id.* ¶ 21(c).

Saks also drafted Beechwood's investment memorandum for the Montsant transaction, as was his job as President of BAM. *Id.* ¶ 19. In that draft, Saks got basic information regarding the deal, such as the amount of the loan, incorrect and needed to be corrected by others at

Beechwood. *Id.* ¶ 20. Following the transaction, Saks was also to ensure that the terms of the transaction, as negotiated, were fulfilled—particularly ensuring that the value of collateral pledged under the agreement equaled or exceeded two times the amount of the note. *Id.* ¶ 21(b)-(c); *see also* Schwartz Decl. Exs. 2, 9.

None of Saks' activity rises to the level of substantial assistance, *i.e.* that Saks was a proximate cause of harm to PPVA investors. As stated above, no evidence suggests that Saks played a role in, and Saks denies playing a role in, "negotiating or structuring or designing the transaction." SMF ¶ 16. Saks received a description of the transaction from and was asked to execute the transaction documents by in-house counsel Christian Thomas, as well as his bosses who hired and promoted him, Mark Feuer and Scott Taylor. *Id.* ¶ 18. Even if PPVA had adduced clear and convincing evidence that Saks actually knew of the primary fraud, and they have not, "awareness and approval [of a fraud], standing alone, do not constitute substantial assistance." *Armstrong v. McAlpin*, 699 F.2d 79, 92 (2d Cir. 1983). Put differently, substantial assistance does not arise from the fact that Saks did not "blow the whistle on" a transaction negotiated by others. *Morin v. Trupin*, 711 F. Supp. 97, 113 (S.D.N.Y. 1989). Saks could not make this argument at the motion to dismiss stage because PPVA alleged, incorrectly, that Saks was "involved in orchestrating" the Montsant transaction. Schwartz Decl. Ex. 1, SAC ¶ 192. But the facts do not support that assertion.

The facts demonstrate that Saks was provided minimal information regarding, and had minimal involvement in, the conception of this deal, which does not constitute substantial assistance. To the extent the Montsant transaction was even problematic (which the Court need not decide to grant summary judgment to Saks), the doctrine of aiding and abetting does not require a defendant to fix or correct a problem created entirely by others. "Absent a duty to act,

the only action prescribed is not to 'affirmatively assist' or to 'help conceal,' which is another form of assistance and is likewise affirmative in nature." *In re Sharp Int'l Corp.*, 403 F.3d 43, 52 (2d Cir. 2005); *cf. id.* ("A company in position to thwart or expose a breach of fiduciary duty may protect its interests by doing neither, sitting tight, and being quiet."). Saks was a Beechwood employee, with fiduciary duties to his own clients, and not to PPVA's investors. To the extent Saks had awareness that the Montsant transaction would constitute a breach of Platinum's fiduciary duties to its investors, he had no duty to correct it when he played no role in formulating the deal that caused it.

CONCLUSION

For the foregoing reasons, Saks respectfully requests that the Court grant his motion for summary judgment and dismiss remaining the causes of action against him.

Dated: February 14, 2020
New York, New York

BINDER & SCHWARTZ LLP

/s/ Wendy H. Schwartz
Wendy H. Schwartz
Gregory C. Pruden
366 Madison Avenue, Sixth Floor
New York, NY 10017
Tel: (212) 510-7008
Fax: (212) 510-7229
wschwartz@binderschwartz.com
gpruden@binderschwartz.com

Attorneys for Defendant Daniel Saks