**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

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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.

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Case No.: 18-cv-10936 (JSR)

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S, SETH GERSZBERG, MOTION FOR SUMMARY JUDGMENT**

**EPSTEIN OSTROVE, LLC**
Elliot D. Ostrove, Esq.
Vahbiz P. Karanjia, Esq.
EPSTEIN OSTROVE, LLC
200 Metroplex Drive, Suite 304
Edison, New Jersey 08817

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 brief together with the Declaration of Seth Gerszberg dated February 14, 2020, (the "Gerszberg Decl.") and a Statement of Material Facts, dated February 14, 2020 (the "SMF"), in support of Mr. Gerszberg's Motion for Summary Judgment. For the reasons set forth below, summary judgment should be entered in favor of Mr. Gerszberg and against Plaintiffs.

Mr. Gerszberg, an insignificant figure in the context of the bigger picture of this litigation is before this Court because of the allegations by Plaintiffs against others. Admitting that Mr. Gerszberg truly was not an insider and otherwise did not have any duty to PPVA[1] and its related companies, the claims against Mr. Gerszberg are limited to allegations of aiding and abetting the alleged wrongdoing of others. Proof of the allegations against the other is, of course a pre-requisite to finding any liability against Mr. Gerszberg. However, even assuming Plaintiffs can prove their allegations against the Platinum Defendants, as more specifically set forth below, Plaintiffs' claims against Mr. Gerszberg fail as a matter of fact and as a matter of law.

Plaintiffs allege that in negotiating deals for the benefit of himself and the entities he controlled, Mr. Gerszberg substantially assisted the Platinum Defendants in allegedly breaching their duties to PPVA. However, there is no sufficient evidence of the requisite actual knowledge and/or substantial assistance to support their claim of aiding and abetting. At all times, Mr. Gerszberg believed the Platinum Defendants were acting consistent with whatever obligations they had and that the complained of transactions were ultimately beneficial to himself, his entities, and also to PPVA. Even assuming the transactions were of no benefit to PPVA, Mr. Gerszberg was under no obligation to look out for PPVA's interest or investigate whether the Platinum Defendants

[1] Terms used in the Second Amended Complaint (the "SAC") are herein incorporated by reference.

were possibly in breach of their obligations to PPVA – indeed, he had no reason to believe there was any issue.

Plaintiffs weave a tale of conspiracies and schemes without any actual facts to support their claims. The allegations against Mr. Gerszberg relate to his involvement in three transactions with PPVA. Two of those transactions arose from the prior lending relationship between PPVA (through its subsidiary – Atlantic Growth, LLC) and a collection of entities ("The Collective") controlled by Mr. Gerszberg. The third transaction was a viable business deal that by all accounts would have benefitted all involved, including PPVA.

Plaintiffs mischaracterize the nature of the complained of transactions in an effort to support their allegations. The business relationship between Mr. Gerszberg and PPVA dates back to August 2014 when the PPVA subsidiary, Atlantic Growth, agreed to provide a $40 million loan to The Collective in exchange for, among other things, a 50% interest in The Collective. Notwithstanding that it agreed to fund a $40 million loan, Atlantic Growth failed to fulfill its commitment, which created a domino effect that ultimately led to the collapse of The Collective's operations. In a bid to save its 50% ownership interest in The Collective, a deal was entered into with West Loop/Epocs. The straightforward plan was for The Collective to receive a loan from West Loop/Epocs in order for it to resume operations and realize profits during its busiest season. PPVA, guaranteed The Collective's obligations to West Loop/Epocs. That the plan was ultimately unsuccessful – because The Collective did not make enough profit to cover its debt – did not relieve PPVA from its obligations as guarantor. Consequently, West Loop/Epocs sought to collect payment from PPVA and threatened to bring legal action to collect its debt. To avoid any legal action, PPVA bargained for and entered into a Forbearance and Security Agreement with West Loop/Epocs – a deal brokered by Mr. Gerszberg for the benefit of all involved. Thus, PPVA's

guarantor obligations to West Loop/Epocs resulted in the Forbearance and Security Agreement that Plaintiffs allege was also part of the Second Scheme. This series of transactions certainly make sense when viewed in the context of the entirety of the business dealings between The Collective, Atlantic Growth, and West Loop/Epocs. There was no "scheme."

The last complained of transaction was a loan from a PPVA subsidiary and another entity controlled by Mr. Gerszberg, under a proposed reverse merger between entities controlled by PPVA and Mr. Gerszberg. Plaintiffs' assertions of Mr. Gerszberg's involvement in the Second Scheme is refuted by the record, which reflects communications between certain PPVA insiders as to the viability of the proposed reverse merger and the required due diligence to be conducted. Simply put, contrary to Plaintiffs' assertions, there was no "scheme" but rather a reasonable business transaction that was supported by the diligence conducted at the time.

Based on the foregoing, and for the reasons more fully set forth below, Mr. Gerszberg has sufficiently shown that there is no issue of material fact that would withstand summary judgment on Plaintiffs' claims against Mr. Gerszberg for aiding and abetting a breach of fiduciary duty and unjust enrichment. As such, it is respectfully submitted that Mr. Gerszberg's motion for summary judgment be granted and the Amended Complaint be dismissed with prejudice.

## II. FACTS

This case involves several transactions entered into by PPVA prior to its collapse. Plaintiffs allege that the transactions were not in PPVA's best interest and thus seek to hold certain PPVA officers and insiders liable for the alleged harm suffered by PPVA. Plaintiffs also seek to hold Mr. Gerszberg liable for allegedly aiding and abetting those PPVA officers and insiders by doing no more than negotiating deals that were beneficial to him and the entities he controlled.

**THE COLLECTIVE**

Mr. Gerszberg is a veteran of the apparel industry, with a proven history of success in the business, building one of the largest youth culture street-wear brands in the world, with sales exceeding billions of dollars. (*See* Local Civil Rule 56.1 Statement of Material Facts ("SMF") ¶1; Gerszberg. Decl., ¶2). Mr. Gerszberg operated a group of affiliated companies engaged in the street-wear apparel business, all of which together, operated under "The Collective." (*See* SMF ¶2; Gerszberg Decl., ¶3). The Collective supplied its own stores and contracted with wholesale and retail establishments such as, Bloomingdales LLC, Macys Merchandise Corporation, Dillards, etc., to sell apparel and related goods. (*See* SMF ¶4; Gerszberg Decl., ¶5). The Collective also contracted with various importers for the supply of the apparel and goods. (*See* SMF ¶5; Gerszberg Decl., ¶5). Some suppliers had to be paid up front, while others provided supplies on consignment. West Loop, South LLC,[2] ("West Loop") was one of the suppliers that bought and sold goods to The Collective. (*See* SMF ¶7; Gerszberg Decl., ¶7).

**THE COLLECTIVE/ATLANTIC GROWTH DEAL**

Sometime in 2013, Mr. Gerszberg was introduced to Mark Nordlicht and other PPVA officers through a business broker. (*See* SMF ¶3; Gerszberg Decl., ¶4). On or about September 8, 2014, Atlantic Growth Capital, LLC, ("Atlantic Growth"), a PPVA 65% and PPCO 35% subsidiary, entered into a loan agreement comprising Over Everything, LLC,[3] (the "Atlantic Growth Agreement"). (*See* SMF ¶8; Gerszberg Decl., ¶8, **Exh.1**). Pursuant to the Atlantic Growth Agreement, Atlantic Growth was to provide The Collective with a working capital loan of $10 million and a $30 million line of credit. (*See* SMF ¶8; Gerszberg Decl., ¶¶9-10). In exchange,

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[2] West Loop is a company owned and controlled by Steve Finkelman and Alan Finkelman (the "Finkelmans"). (*See* SMF ¶7, FN 1).

[3] Over Everything was the umbrella company for a collection of companies including TC OPS, 3Tac, and Suchman, d/b/a The Collective.

Atlantic Growth obtained a 50% ownership interest of 50% of each of the entities listed in the loan agreement.[4] (*See* SMF ¶11; Gerszberg Decl., ¶¶9-10).

At the time of the Atlantic Growth Agreement, The Collective had a book value of $40 million, including a $20 million investment made by Mr. Gerszberg into the company within the preceding 12 months. (*See* SMF ¶12; Gerszberg Decl., ¶11). The Collective was required to pay interest on the loan from Atlantic Growth, which was personally guaranteed by Mr. Gerszberg. (*See* SMF ¶13; Gerszberg Decl., ¶12). Mr. Gerszberg's $20 million investment in The Collective was valued at $15 million, and Mr. Gerszberg was to be paid monthly interest payments. (*See* SMF ¶14; Gerszberg Decl., ¶12). The Collective also received additional loan funding from Rosenthal and Rosenthal ("Rosenthal"), which was personally guaranteed by Mr. Gerszberg. (*See* SMF ¶15; Gerszberg Decl., ¶13). In addition, Mr. Gerszberg posted a $1 million security deposit with Rosenthal. (*See* SMF ¶16; Gerszberg Decl., ¶13).

In the months that followed, Atlantic Growth struggled to provide funds to The Collective and, ultimately, failed to fulfill its contractual obligations. (*See* SMF ¶¶17-21; Gerszberg Decl., ¶¶14-16). Indeed, Atlantic Growth's failure to provide the necessary funds in a timely manner led to the abandonment of several strategic business opportunities by The Collective. (*See* SMF ¶17; Gerszberg Decl., ¶14). For example, The Collective had secured a first right option to purchase an online e-commerce site for $13 million called Karmaloop. (*See* SMF ¶18; Gerszberg Decl., ¶14) The first right option was secured with a payment by The Collective of $4 million and, as such, the balance was required for the deal to close. (*See* SMF ¶19; Gerszberg Decl., ¶14).

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[4] Two main entities - Over Everything, LLC and Suchman, LLC, were listed as the Borrowers, with 10 of their subsidiaries listed as Guarantors and additional Credit Parties to the loan agreement. (*See* SMF ¶11, FN 2).

However, due to Atlantic's Growth failure to provide the necessary funds, The Collective lost $4 million and could not purchase the e-commerce site. (*See* SMF ¶20; Gerszberg Decl., ¶14).

Ultimately, of the $40 million promised, The Collective received only about $15 million from Atlantic Growth. (*See* SMF ¶21; Gerszberg Decl., ¶15). Another PPVA-related fund, PPNE, guaranteed another $5,000,000 to $7,000,000 of product via third party commitments. (*See* SMF ¶22; Gerszberg Decl., ¶15). The Collective suffered significant losses due to Atlantic Growth's failure to provide required and timely funding. For example, The Collective could not purchase or grow brands; marginal marketing budgets were not available to build acceptance or awareness; missed deliveries; incurred excess handling and processing costs; and lost critical personnel. (*See* SMF ¶¶24-26; Gerszberg Decl., ¶¶16-18). Also, The Collective failed to meet the majority of the orders placed by wholesale and retail establishments, thereby breaching its contractual obligations to them and to the partner brands. (*See* SMF ¶¶27-28; Gerszberg Decl., ¶18). Consequently, the parties agreed that The Collective would stop paying interest on the loans from Atlantic Growth. (*See* SMF ¶29-30; Gerszberg Decl., ¶19). In addition, PPVA directed The Collective not to pay West Loop for their outstanding payables, even though West Loop's invoices were significant both in dollar amount and age. (*See* SMF ¶31; Gerszberg Decl., ¶19). PPVA insisted on the requirement that The Collective not pay West Loop, because West Loop was owned by Mr. Gerszberg's relatives. (*See* SMF ¶32; Gerszberg Decl., ¶¶19).

**THE COLLECTIVE, PPVA, AND WEST LOOP/EPOCS DEAL**

Despite the adversity by The Collective, there were still positive signs that its business model had merit. (*See* SMF ¶33). The Collective saw improved margin and sell through rates on its new deliveries. (*See* SMF ¶¶34-36; Gerszberg Decl., ¶20). Frantically working to try to revive The Collective, Mr. Gerszberg planned to create cash flow by trying to take advantage of The

Collective's peak selling periods. (*See* SMF ¶¶37-38; Gerszberg Decl., ¶21). In order to do so, The Collective needed funding to purchase inventory and Mr. Gerszberg sought funds from various investors. (*See* SMF ¶39; Gerszberg Decl., ¶22). Mr. Gerszberg also reached out to PPVA as it had a fifty percent (50%) interest in The Collective (through Atlantic Growth), and Atlantic Growth owed The Collective approximately $25 million. (*See* SMF ¶40; Gerszberg Decl., ¶23). Accordingly, in an email to Mr. Nordlicht dated August 10, 2015, Mr. Gerszberg laid out the opportunities for The Collective to realize profits during its peak sales period. (*See* SMF ¶41; Gerszberg Decl., ¶24, **Exh. 2**). In response, Mr. Nordlicht suggested that The Collective purchase apparel and goods from West Loop, one of The Collective's long-standing suppliers. (*See* SMF ¶42; Gerszberg Decl., ¶¶25-27). It was also suggested that West Loop provide funding to The Collective so that The Collective could purchase apparel to be sold during the holiday season. (*See* SMF ¶42; Gerszberg Decl., ¶¶25). In exchange for the loan from West Loop/Epocs,[5]agreed to increase the funding from Atlantic Growth to $20 million paid, leaving $20 million still unpaid. (*See* SMF ¶43; Gerszberg Decl., ¶¶26). Mr. Nordlicht further proposed that PPVA would grant West Loop/Epocs a security interest in the PPNE Notes as guarantee of The Collective's obligations to West Loop/Epocs. (*See* SMF ¶¶44-45; Gerszberg Decl., ¶27). Seeing this as nothing more than a sound business opportunity - and a reasonable offer in light of the fact that The Collective was in its precarious position because Atlantic Growth had filed to fund the line of credit it promised - Mr. Gerszberg agreed to the proposal and persuaded West Loop to agree to it too.

On October 13, 2015, The Collective and West Loop/Epocs entered into an Inventory Purchase and Sale Agreement. (*See* SMF ¶46; Gerszberg Decl., ¶28). Despite The Collective's

[5] The loan was made by West Loop and Epocs Real Estate Partnership, Ltd., ("Epocs") - another entity controlled by the Finkelmans.

efforts, it did not manage to get enough inventory out to stores and customers before Christmas to make enough profits during the holiday season to cover its debt. (*See* SMF ¶47; Gerszberg Decl., ¶29). As such, The Collective's debt to West Loop/Epocs was due and owing and PPVA and/or PPNE as guarantor also became liable to repay the debt. (*See* SMF ¶48; Gerszberg Decl., ¶30). By December of 2015 Rosenthal, PPVA, and Mr. Gerszberg, all agreed to liquidate the business. (*See* SMF ¶49; Gerszberg Decl., ¶31).

In light of the personal liability from the Atlantic Growth deal plus the significant loss of personal wealth Mr. Gerszberg experienced because of PPVA's misrepresentations, Mr. Gerszberg contemplated suing PPVA. (*See* Gerszberg Decl., ¶31). Mr. Gerszberg ultimately decided not to sue and chose to work on ensuring that his debts were repaid. (*See* SMF ¶50; Gerszberg Decl., ¶32). To that end, Mr. Nordlicht agreed to release Mr. Gerszberg from his personal guarantees to PPVA and to accept responsibility for $2 million of the outstanding Rosenthal debt of $4 million. (*See* SMF ¶51; Gerszberg Decl., ¶31). However, Rosenthal retained the $1 million security deposit, did not receive the $2 million from PPVA, and has now obtained a $3 million judgment against Mr. Gerszberg. (*See* Gerszberg Decl., ¶31).

Despite PPVA's fifty percent (50%) ownership interest in The Collective, Plaintiffs would like the Court to believe that deal was only beneficial to The Collective and that Mr. Gerszberg's friendship with Mr. Nordlicht was the only reason for the deal. The undisputed facts refute Plaintiffs' erroneous position. While Mr. Gerszberg was working to ensure that The Collective be able to resume operations, he also had every reason to believe that the arrangement was beneficial to PPVA: (i) as part-owner of The Collective; and (2) in partial relief of its breach of the loan agreement.

**THE SPECTRUM30/ZAPATA DEAL**

One of Mr. Gerszberg's business ventures was the development of water and air technology. (*See* SMF ¶52; Gerszberg Decl., ¶33)This business was conducted through an entity named JLIP, LLC ("JLIP[6]"), which owned intellectual property ("IP") rights relating to water, air, and jet propulsion technology throughout the US and certain foreign countries. (*Id.;* Gerszberg Decl., ¶¶33-34). Mr. Gerszberg had personally invested $6 million in JLIP. (*See* SMF ¶53; Gerszberg Decl., ¶¶33-34). Mr. Gerszberg had discussed with Mr. Zapata different structures for merging the JLIP IP with the Zapata Holdings ("Zapata"), which owned certain intellectual property rights relating to water and air technology. (*See* SMF ¶¶54-56; Gerszberg Decl., ¶¶34-36).

On June 3, 2016, Mr. Gerszberg, Spectrum30, LLC ("Spectrum30"), and Franky Zapata ("Mr. Zapata"),[7]entered into a Master Agreement for the Unification of Zapata and JLIP ("the Zapata Agreement"). (*See* SMF ¶57; Gerszberg Decl., ¶37, **Exh.** 3). Pursuant to the Zapata Agreement, Mr. Gerszberg, Spectrum30, and Mr. Zapata formed a new business that would own the intellectual property rights of JLIP and Zapata. (*See* SMF ¶58; Gerszberg Decl., ¶37, **Exh.** 3). Specifically, Mr. Gerszberg would convey: (i) all of JLIP's IP rights; (ii) payment of €8 million to Mr. Zapata; and (iii) provide €2 million in the form of a working capital loan to the new company. (*See* SMF ¶59; Gerszberg Decl., ¶38). Mr. Zapata would in turn convey all of Zapata's IP rights, and his operating company - which had earned over $2 million in the prior year - plus contribute a €3 million working capital loan to the new company. (*See* SMF ¶60; Gerszberg Decl., ¶39). A condition precedent to the closing of the Zapata Agreement was Spectrum30's obligation to make certain payments to Zapata. (*See* SMF ¶59-60; Gerszberg Decl., ¶39).

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[6] JLIP, LLC was owned by Mr. Gerszberg and Raymond Li. (*See* SMF ¶52; Gerszberg Decl., ¶37).

[7] Mr. Zapata is the sole owner of Zapata. (*See* SMF ¶57; Gerszberg Decl., ¶37).

**THE IMSC/ZAPATA DEAL**

PPVA and/or PPVA subsidiaries, had a majority stake in Implant Sciences Corporation ("IMSC"), a publicly traded company that sold explosive trace detection technology to airports globally. (*See* SMF ¶61; Gerszberg Decl., ¶40). IMSC sought options to reduce its debt to PPVA and expand its business by selling its current technology. (*See* SMF ¶62; Gerszberg Decl., ¶40). The proceeds from the sale of the technology would be used to repay the PPVA debt and the projected excess cash of approximately $40 million would be used to purchase a new military or security-oriented product that would increase shareholder value and demonstrate growth. (*See* SMF ¶63; Gerszberg Decl., ¶40). With decades of experience in various industries, Mr. Gerszberg saw this as a viable business opportunity and began developing business strategies.

One of the strategies proposed by was a reverse merger between IMSC and Zapata. (*See* SMF ¶64; Gerszberg Decl., ¶41). In May of 2016, managers of PPVA introduced Mr. Gerszberg to the President of IMSC, Robert Liscouski ("Mr. Liscouski"). (*See* SMF ¶65; Gerszberg Decl., ¶41). The IMSC/Zapata deal was viewed as creating the highest potential financial outcome for the IMSC business, one of many deals being considered by PPVA in its search for new business. (*See* SMF ¶66; Gerszberg Decl., ¶41-43).

**PPVA'S AGREEMENT TO REPAY WEST LOOP/EPOCS UNDER THE IMSC/ZAPATA DEAL**

As set forth above, Spectrum30 was obligated to make certain payments to Zapata under the Zapata Agreement. (*See* SMF ¶¶59-60; Gerszberg Decl., ¶38). Zapata was getting many inquiries from various potential companies and venture capitalists. (*See* SMF ¶67; Gerszberg Decl., ¶44). Thus, Mr. Gerszberg sought financing for Spectrum30 under the Zapata Agreement from various other investors. (*See* SMF ¶68; Gerszberg Decl., ¶45). During negotiations with PPVA, Mr. Nordlicht explained the unique circumstance that existed with IMSC. (*See* SMF ¶69;

Gerszberg Decl., ¶46). The nature of the sale of the ETD (explosive trace detection) system would provide a clean public company with $35 million of cash and an opportunity to allow many excited customers to invest in shares of Zapata's breakthrough technology. (*See* SMF ¶70; Gerszberg Decl., ¶45). The story of IMSC changing its name to ZAPATA and marketing its unique IP for the smallest, fastest, most agile, flying device in the world, as well as our hydro flight recreational business, seemed to be a recipe for a great increase in stock value. (*See* SMF ¶71; Gerszberg Decl., ¶45). This position was further validated by Mr. Gerszberg's attorneys as well as the IMSC board and the IMSC attorneys. (*See* SMF ¶72; Gerszberg Decl., ¶46). The proposed result of the reverse merger was that Spectrum30 would own 60% and existing IMSC shareholders would have 40%. (*See* SMF ¶73; Gerszberg Decl., ¶45). PPVA would have warrants and options totaling 60% or approximately $140 million. (*See* SMF ¶74; Gerszberg Decl., ¶47).

Notwithstanding the proposed benefits of the deal, Mr. Gerszberg was concerned about entering into an agreement with PPVA and/or companies with significant PPVA investments because of the significant unpaid debt to West Loop/Epocs, and the financial impact he faced in the aftermath of the Atlantic Growth/The Collective deal. (*See* SMF ¶75; Gerszberg Decl., ¶48). Mr. Gerszberg was unwilling to enter a new investment with PPVA's involvement without ensuring West Loop/Epocs would be repaid. (*See* SMF ¶¶76-77; Gerszberg Decl., ¶¶48-49). Also, after the collapse of The Collective, West Loop sought to collect its payment from PPVA as guarantors of The Collective. (*See* SMF ¶78; Gerszberg Decl., ¶¶50). Because PPVA was yet to satisfy its obligations as guarantor, West Loop/Epocs threatened to bring legal action against PPVA. (*See* SMF ¶79; Gerszberg Decl., ¶50). Consequently, PPVA proposed providing Mr. Gerszberg with the financing required for Spectrum30 under the Zapata Agreement in the form of a $15 million loan and the right to offset that loan with payments to West Loop/Epoc. (*See* SMF

¶80; Gerszberg Decl., ¶51). In exchange, Mr. Gerszberg agreed to finalize the proposed reverse merger between Zapata and IMSC. (*See* SMF ¶81; Gerszberg Decl., ¶51). Further, due to Mr. Gerszberg's refusal to transact with IMSC or PPVA unless and until West Loop/Epocs was repaid, PPVA agreed that West Loop/Epocs would be repaid from the proceeds of the IMSC/Zapata profits. (*See* SMF ¶82; Gerszberg Decl., ¶¶52). A necessary precondition to the Huron Loan Document negotiated by Mr. Gerszberg was that he was allowed to offset the money owed to West Loop/Epocs prior to PPVA's repayment. (*See* SMF ¶83; Gerszberg Decl., ¶53). In exchange, West Loop/Epocs agreed to forbear from exercising its rights against PPVA with respect to The Collective, PPVA, and West Loop/ Epocs deal – an arrangement that Mr. Gerszberg achieved for the benefit and protection of PPVA.[8] (*See* SMF ¶84; Gerszberg Decl., ¶54).

The framework for the Zapata/IMSC Merger is set forth in the June 9, 2016 agreement between the PPVA subsidiary Huron Capital, LLC ("Huron") and Spectrum30, LLC (the "Huron Loan Document"). (*See* SMF ¶85; Gerszberg Decl., ¶55, **Exh. 4**). Pursuant to the Huron Loan Document, Mr. Gerszberg was required to complete all the related conditions-precedent in order to effectuate the deal. (*See* SMF ¶86; Gerszberg Decl., ¶¶53-56). One of those conditions was the execution of a Forbearance and Security Agreement, between West Loop/Epocs and PPVA. (*See* SMF ¶¶87-89; Gerszberg Decl., ¶¶57). On or around July 5, 2016, the parties executed the Forbearance and Security agreement, thereby fulfilling the required conditions of the June 9, 2016 Agreement. (*See* SMF ¶¶ 90-91; Gerszberg Decl., ¶¶58, **Exh. 5**).

[8] Because Atlantic Growth had defaulted in its obligations to fund the line of credit to The Collective, PPVA agreed to guarantee The Collective's loan and buy back obligations to West Loop/Epocs. Notwithstanding Mr. Gerszberg's best efforts, the Collective's attempt at reviving its operations through the PPVA and West Loop/Epocs deal was too little, too late. As such, The Collective's debt to West Loop/Epocs was due and owing, and PPVA, as guarantor, was liable to settle that debt.

## III. LEGAL ARGUMENT

### A. Legal Standard

A district court shall grant summary judgment as to any claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P.* 56(a). Thus, summary judgment is appropriate where, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (citing *Fed. R. Civ. P.* 56).

An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* at 247-48 (emphasis in original).

In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the non-moving party's claim. *See Celotex Corp.*, 477 U.S. 317 at 325. The Court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford*, 361 F. 3d 113 (2d Cir. 2004).

Mr. Gerszberg submits that there are no genuine issues of material fact regarding Plaintiffs' claims of (i) aiding and abetting; and/or (ii) unjust enrichment claims. Based on the undisputed facts, Mr. Gerszberg did not actually know of the alleged breach that occurred pursuant to the complained of transactions and he did not knowingly induce or participate in any alleged breach committed by the Platinum Defendants. For all the reasons set forth below, Mr. Gerszberg is entitled to summary judgment and Plaintiffs' Second Amended Complaint as against Mr. Gerszberg should be dismissed.

### B. Mr. Gerszberg is Entitled to Summary Judgment Because Mr. Gerszberg Did Not Know, or Participate, in the Platinum Defendant's alleged Breaches of their Obligations to PPVA[9]

The elements of a claim for aiding and abetting breach of fiduciary duty under New York Law 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." *See In re Sharp Int'l Corp.*, 402 F.3d 43 (2d Cir. 2005).

Here, the record does not reflect that Mr. Gerszberg had actual knowledge that the Platinum Defendants entered into the complained of transactions in breach of their obligations to PPVA. At every juncture, Mr. Gerszberg engaged in each transaction to benefit The Collective, but with the understanding that PPVA would also benefit from the transactions. Plaintiffs admit that The Collective and Mr. Gerszberg had a prior lending relationship with PPVA through Atlantic Growth. (*See* SAC ¶730). Atlantic Growth's failure to meet its contractual obligations to The Collective led to the subsequent negotiations between PPVA, The Collective, and West

[9] It is not known whether Plaintiffs will even be able to prove the breaches of duty they had alleged were committed by the Platinum Defendants. Of course, if Plaintiffs' fail to so prove then Plaintiffs' claims against Mr. Gerszberg necessarily fail. While it seems doubtful that Plaintiffs will be able to ultimately prove any breach by the Platinum Defendants, Mr. Gerszberg submits that even if those breaches are proven, the claims against him fail as a matter of fact and a matter of law.

Loop/Epocs. (*See* Gerszberg Decl., ¶¶8-21). As discussed in detail below, because Plaintiffs cannot demonstrate any of the elements of the aiding and abetting claim against Mr. Gerszberg, summary judgment must be entered in favor of Mr. Gerszberg and against Plaintiffs. *See Briarpatch Ltd., L.P. v. Geisler Roberdeau, Inc.*, 2007 U.S. Dist. LEXIS 27001 (2d. Cir. 2007), (dismissing aiding and abetting claims for failure to establish that the defendants had actual knowledge that the general partners were breaching or intended to breach their fiduciary duty to the Plaintiffs).

1. There is No Evidence That Mr. Gerszberg Had Actual Knowledge of the Platinum Defendants' Breaches of Their Obligations to PPVA[10]

An essential element of Plaintiffs' aiding and abetting claim is that Mr. Gerszberg *actually knew* of the alleged Second Scheme, which allegedly involved the Platinum Defendants' encumbrance of PPVA's assets and failure to include such encumbrances in the calculation of PPVA's NAV. (*See* SAC, ¶726). Although a plaintiff is not required to allege that the aider and abettor had an intent to harm, there must be an allegation that such defendant had actual knowledge of the breach of duty. *See S&K Sales Co. v. Nike, Inc.*, 816 F. 2d 843 (2d Cir. 1987). Constructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability. *See Kolbeck v. LIT Am., Inc.*, 939 F. Supp. 240, 246 (S.D.N.Y.1996), *affirmed* 152 F. 3d 918 (2d. Cir 1998).

Simply put, Plaintiffs have no evidence and cannot show that Mr. Gerszberg had actual knowledge of any alleged breaches by the Platinum Defendants.

*a) The PPVA/West Loop Transaction Was Intended to Benefit PPVA as 50% Owner of The Collective*

[10] Assuming there were any such breaches.

Plaintiffs allege that Mr. Gerszberg had actual knowledge that the Platinum Defendants were breaching their fiduciary obligations to PPVA by engaging in the Second Scheme, which allegedly includes, causing PPVA to enter into the PPVA/West Loop transaction, to the alleged detriment of PPVA. (*See* SAC, ¶¶737, 932). Nothing could be further from the truth.

The Collective had experienced substantial loss due to PPVA's (through Atlantic Growth) failure to provide the $40 million loan as agreed. (*See* Gerszberg Decl., ¶¶8-21). In other words, PPVA was in breach of its obligations to The Collective. Finding itself in breach of a contractual obligation and needing a way to mitigate that breach, Mr. Nordlicht proposed the plan for The Collective to obtain funding from West Loop in order to resume its operations. (*See* Gerszberg Decl., ¶¶24-25). Mr. Nordlicht's proposal was in response to an e-mail from Mr. Gerszberg, which laid out The Collective's problems as well as the opportunities for The Collective to realize profits during the approaching holiday period. (*Id.*). Mr. Gerszberg could only assume that Mr. Nordlicht considered the opportunities presented as viable and beneficial to PPVA. Plaintiffs have no evidence to show that Mr. Gerszberg actually knew otherwise.

The proposed strategy was ultimately accepted by The Collective and West Loop. In exchange for West Loop/Epocs providing additional funds for The Collective to operate during the holiday season, PPVA guaranteed The Collective's obligations by granting West Loop security interests in the PPNE fund. (*See* Gerszberg Decl., ¶¶26-28). Having a 50% ownership interest in The Collective, PPVA stood to gain if The Collective resumed its operations and made a profit. (*See* Gerszberg Decl., ¶23). Therefore, the Platinum Defendants did not fail to protect PPVA's interest but sought to protect that interest by proposing and facilitating the loan from West Loop/Epocs. There is no evidence that Mr. Gerszberg engaged in the West Loop/Epocs transaction knowing that the Platinum Defendants were in breach of any obligations to PPVA.

*b) PPVA Benefitted from the Forbearance and Security Agreement*

The alleged Second Scheme also includes, the Forbearance and Security Agreement between PPVA and West Loop/Epocs. Contrary to Plaintiffs' assertion, the Forbearance and Security Agreement was negotiated by the parties to benefit PPVA and was more than reasonable under the circumstances. As set forth above, PPVA guaranteed The Collective's loan and buy back obligations to West Loop/Epocs. (*See* Gerszberg Decl., ¶27). PPVA's obligation was evidenced by the August 12, 2015 Note and Purchase and Sale Agreement dated October 13, 2015. (*See* Gerszberg Decl., ¶¶27-28). Because The Collective was unable to pay its debt, PPVA was liable to make the payments owed to West Loop.

In support of their claims against Mr. Gerszberg, Plaintiffs reference an e-mail from Mr. Nordlicht to Mr. Gerszberg dated July 5, 2016. However, instead of supporting their claims, the July 5, 2016 e-mail demonstrates that a debt collection action by West Loop/Epocs would have placed PPVA in a precarious situation, which PPVA sought to avoid by entering into a settlement agreement with West Loop/Epocs. As such, the parties agreed on the Forbearance and Security Agreement.

The loan agreement between Huron and Spectrum30 was executed on June 9, 2016. (*See* Gerszberg Decl., ¶54) Mr. Gerszberg was required to complete all the conditions-precedent in order to effectuate the deal with 30 days. One of those conditions-precedent was the execution of a Forbearance and Security Agreement between West Loop/Epocs and PPVA. (*See* Gerszberg Decl., ¶¶55-58). Thus, the Forbearance and Security Agreement was not executed in response to Mr. Nordlicht's e-mail, but as part of the fulfillment of the conditions-precedent of the June 9, 2016 loan agreement. Based on the record, Plaintiffs' claim that the Forbearance and Security Agreement was a "papering" of wrongful acts to make them appear legitimate is just wrong.

*c) The IMSC/Zapata Transaction was Intended to Benefit PPVA*

Plaintiffs allege that the $15 million loan to Spectrum30, which was a part of the IMSC Zapata transaction was to the detriment of PPVA and part of the Second Scheme. (*See* SAC, ¶¶751, 932). Plaintiffs provide no evidence to establish their claim that Mr. Gerszberg engaged in the IMSC/Zapata transaction with direct knowledge of PPVA's imminent liquidation. Indeed, contrary to Plaintiffs' allegations, the evidence of prior negotiations between the parties refutes any such claim. Specifically, the e-mail from the President of IMSC, Mr. Licouswki, dated May 12, 2016, establishes that: (i) the IMSC/Zapata deal was not the only strategy being considered by PPVA; (ii) the Platinum Defendants and IMSC considered the IMSC/Zapata deal to be viable; and (iii) the Platinum Defendants carried out the necessary due diligence prior to accepting the strategy. (*See* Gerszberg Decl., ¶46).

In *Pension Comm. of the Univ of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 652 F. Supp. 2d 495 (2d. Cir. 2009), which involved aiding and abetting claims against a broker in connection with the liquidation of two hedge funds, the Court found that the plaintiff investors provided sufficient evidence to create a genuine issue of fact as to whether the broker had substantially assisted the fund managers in breaching their fiduciary duty. The evidence included, the broker's generation of reports and account statements that included misleading information, evidence that the fund managers were deceptively recording privately placed shares at their freely trading price, as well as evidence that the broker knowingly made false statements about the funds' conservative pricing and purchasing information.

Here, Mr. Gerszberg's dealings with PPVA do not amount to anything more than an arms-length commercial transaction intended to benefit the parties involved. This Court previously found that Mr. Gerszberg is not an insider of officer of PPVA. (*See* Dkt. No. 408; Op. at 21). Mr. Gerszberg proposed a business strategy that was ultimately adopted by those in control of PPVA

after what appeared to Mr. Gerszberg to be careful consideration and significant due diligence. (*See* Gerszberg Decl., ¶46). Nothing in the record demonstrates that Mr. Gerszberg had actual knowledge that by doing so, the Platinum Defendants would be breaching their obligations to PPVA. *See also Uddo v. Deluca*, Civ. No. 17-cv-3848, 2019 U.S. Dist. LEXIS 209191 at *34 (E.D.NY. Dec. 4, 2019) (holding that a claim that a defendant knowingly induced or participated in a fiduciary breach necessarily fails if the defendant did not know of the fiduciary duty).

For all the reasons set forth above, Plaintiffs' have not established that Mr. Gerszberg had actual knowledge of the Platinum Defendants' breaches. As such, Plaintiff's aiding and abetting claim fails.

### C. Mr. Gerszberg did not Substantially Assist the Platinum Defendants' Breaches Through the West Loop/Epocs Transactions

An essential element of Plaintiffs' aiding and abetting claims is that Mr. Gerszberg substantially assisted the Platinum Defendants in breaching their obligations to PPVA. 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 (1st Dep't 2003). Plaintiffs cannot prove that any of the alleged acts committed by Mr. Gerszberg satisfies the above standard.

The crux of Plaintiffs' allegations is that the complained of transactions were executed solely to encumber PPVA's assets for the benefit of certain preferred investors and creditors, including Mr. Gerszberg. (*See* SAC, ¶¶10, 726). The actual facts do not support such fantasy.

First, no jury could reasonably conclude that by doing nothing more than negotiating a deal to protect his company's interest (and PPVA's ownership interest), Mr. Gerszberg affirmatively

assisted the Platinum Defendants in breaching their obligations to PPVA. Indeed, the record reflects that the West Loop/Epocs deal was facilitated by Mr. Gerszberg to fix the problem created by PPVA. (*See* Gerszberg Decl., ¶¶8, 14-19, 23-30). The Collective's financial struggles and ultimate collapse were caused by PPVA's failure to fulfill its loan commitment to the Collective. (*Id.*). The proposal for PPVA to guarantee The Collective's loan from West Loop/Epocs was simply an attempt by PPVA to mitigate its breach of the loan agreement. Mr. Gerszberg had no reason to inquire or suspect that the Platinum Defendants were breaching any obligations to PPVA by entering into the West Loop/Epocs transaction. Negotiating a transaction that amounted to PPVA: (i) mitigating its breach of the loan agreement to The Collective; and (ii) protecting its 50% ownership interest, does not and cannot constitute providing substantial assistance to the Platinum Defendants.

### D. Mr. Gerszberg Did Not Substantially Assist the Platinum Defendants' Breaches through the Forbearance and Security Agreement and IMSC/Zapata Transactions

Based on the record, Plaintiffs cannot establish that Mr. Gerszberg did more than negotiate an arm's length business transaction for his benefit and those of the entities he controlled. At all times, Mr. Gerszberg believed that the Platinum Defendants were acting consistent with whatever obligations they had to PPVA. Mr. Gerszberg's conduct of negotiating deals for his own benefit and for the benefit of the businesses he controlled is not sufficient to show that he affirmatively assisted the Platinum Defendants in breaching their obligations to PPVA.

Plaintiffs again misrepresent the nature of Mr. Gerszberg's dealings with PPVA with respect to the Forbearance and Security Agreement and IMSC/Zapata deal. A review of the e-mail exchange between Mr. Gerszberg and certain Platinum Defendants reveals that the parties had been negotiating both deals long before the supposed knowledge of PPVA's liquidation. After

months of negotiating and seeking to finalize the IMSC/Zapata deal, a compromise was reached, which resulted in the $15 million loan to Spectrum30 and the Forbearance and Security Agreement. (*See* Gerszberg Decl., ¶¶48-57). Mr. Gerszberg believed that the IMSC/Zapata deal was beneficial to PPVA and to the best of his knowledge so did the Platinum Defendants. Far from being illusory, the Platinum Defendants bargained for the Forbearance and Security Agreement to prevent West Loop/Epocs from taking legal action against PPVA for its failure to fulfill its obligations to West Loop/Epocs as guarantor under the West Loop/Epocs transaction. (*Id.*). For his part, Mr. Gerszberg bargained for the right to offset the West Loop/Epocs debt created by PPVA in the first instance prior to repaying the $15 million loan to PPVA. (*See* Gerszberg Decl., ¶¶51).

Based on the above, no reasonably jury could draw an inference that Mr. Gerszberg's conduct amounted to substantially assisting the Platinum Defendants in breaching their obligations to PPVA. At most, the evidence shows that Mr. Gerszberg negotiated reasonable business deals that appeared, at the time they were made, to be beneficial to all parties.[11]

### E. Mr. Gerszberg is Entitled to Summary Judgment on Plaintiff's Claim for Unjust Enrichment

The basic elements of an unjust enrichment claim in New York require proof "that (1) Mr. Gerszberg was enriched, (2) at Plaintiffs' expense, and (3) equity and good conscience militate against permitting Mr. Gerszberg to retain what Plaintiffs are trying to recover." *See Briarpatch*

[11] The crux of Plaintiffs' claim is that the encumbrances placed on PPVA's assets were not included in the calculation of PPVA's NAV. (*See* SAC, ¶726). Again, Plaintiffs can present no evidence that Mr. Gerszberg was ever involved in that decision. As previously decided by the Court, Mr. Gerszberg is not an insider or officer of PPVA and did not have any authority or control over the persons ultimately responsible for making that decision. As such, no aider and abettor liability can be based on this claim.

*Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004); *Mazzaro de Abreu v. Bank of Am. Corp.*, 525 F. Supp.2d 381 (S.D.N.Y. 2007).

Here, the negotiations between the PPVA and the entities controlled by Mr. Gerszberg arose from the prior lending relationship between the parties and were arm's length deals believed to be beneficial to the parties. Mr. Gerszberg negotiated and agreed to deals that protected his interest and that of the entities he controlled. Because the complained of transactions benefitted both PPVA and Mr. Gerszberg, Plaintiffs cannot establish the elements required for their unjust enrichment claim. As such, and as more fully discussed above, Mr. Gerszberg is entitled to summary judgment and Plaintiffs' Second Amended Complaint as against Mr. Gerszberg should be dismissed.

## IV. CONCLUSION

For the foregoing reasons, Mr. Gerszberg respectfully requests that the Court grant Summary Judgment in his favor and dismiss the Second Amended Complaint with prejudice.

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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*