

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

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MARTIN TROTT AND CHRISTOPHER SMITH,	: Case No.: 18-cv-10936 (JSR)
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),	: :
	: <b>STATEMENT OF MATERIAL</b>
Plaintiffs,	: <b>FACTS</b>
	: :
-v-	: :
	: :
PLATINUM MANAGEMENT (NY) LLC, ET AL.,	: :
	: :
Defendants.	: :
	: :
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Defendant, Seth Gerszberg (“Mr. Gerszberg”), submits the following Statement of Material Facts, pursuant to Fed. R. Civ. P. 56(c) and Local Civil Rule 56.1, in support of his Motion for Summary Judgment:

1. 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.” (Declaration of Seth Gerszberg, (“Seth. Decl.”), dated February 14, 2020, ¶2).
2. Mr. Gerszberg operated a group of affiliated companies engaged in the urban wear apparel business, all of which are commonly referred to as “The Collective.” (*Id.*, ¶3).
3. Toward the end of 2013 Mr. Gerszberg met Mark Nordlicht (“Nordlicht”) and other members of Platinum Partners Value Arbitrage Fund L.P. (“PPVA”) through a business broker. (*Id.*, ¶4).

4. The Collective supplied its own stores as well as other retail establishments such as, Macys, Dillards, and other specialty stores, apparel and related goods under a number of brand names including the Ecko brand. (*Id.*, ¶5).

5. The Collective also contracted with various importers for the supply of the apparel and goods, much of which were purchased from outside the United States, and in some cases, The Collective managed the importations, while in other cases importation was managed by The Collective's suppliers or other 3<sup>rd</sup> party companies. (*Id.*, ¶6).

6. In all cases, the apparel and goods contained The Collective's labels and were exclusively designed by The Collective's internal merchandising and design teams. (*Id.*, ¶6).

7. West Loop, South LLC,<sup>1</sup> ("West Loop") was one of the suppliers that bought and sold goods to The Collective with extra credit terms for a very favorable market fee. (*Id.*, ¶7).

8. On or about September 8, 2014, The Collective entered into a loan agreement with a PPVA subsidiary, Atlantic Growth Capital, LLC, ("Atlantic Growth") (the "Atlantic Growth Agreement"). (*Id.*, ¶8, **Exh. 1**).

9. Pursuant to the Atlantic Growth Agreement, Atlantic Growth was to provide The Collective with funds in a combination of working capital and acquisition funding. (*Id.*, ¶9).

10. Specifically, Atlantic Growth was to provide The Collective with a working capital loan of \$10 million and a \$30 million line of credit. (*Id.*, ¶9).

11. In exchange, Atlantic Growth obtained a 50% ownership interest of 50% of each of the entities listed in the loan agreement.<sup>2</sup> (*Id.*, ¶10).

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<sup>1</sup> West Loop is a company owned and controlled by Steve Finkelman and Alan Finkelman (the "Finkelmans").

<sup>2</sup> 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.

12. At the time of the Atlantic Growth Agreement, The Collective had a book value of \$40 million, including a \$20 million investment Mr. Gerszberg made into the company within the preceding 12 months. (*Id.*, ¶11).

13. Mr. Gerszberg agreed to personally guarantee the Atlantic Growth loan. (*Id.*, ¶12). Mr. Gerszberg also agreed that The Collective would pay interest on loans from Atlantic Growth. (*Id.*, ¶12).

14. Mr. Gerszberg's \$20 million investment in The Collective would be valued at \$15 million, and Mr. Gerszberg was to be paid monthly interest payments. (*Id.*, ¶12).

15. The Collective received additional loan funding from Rosenthal and Rosenthal ("Rosenthal"). (*Id.*, ¶13).

16. Mr. Gerszberg personally guaranteed the Rosenthal loan and personally posted a \$1 million security deposit with Rosenthal. (*Id.*, ¶13).

17. Notwithstanding its contractual obligations, Atlantic Growth did not provide the funds to The Collective, when planned and necessary. (*Id.*, ¶14).

18. The Collective invested \$4 million in order to secure the first right option to purchase an online e-commerce site called Karmaloop. (*Id.*, ¶14).

19. Karmaloop was doing over \$80 million in sales and The Collective had secured the right to purchase it for \$13 million. (*Id.*, ¶14).

20. Atlantic Growth did not fund the \$13 million in time to close and The Collective lost over \$4 million, instead of owning the largest most effectively positioned multi-brand youth culture website.

21. Of the \$40 million Atlantic Growth agreed to provide, The Collective received only about \$15 million from Atlantic Growth. (*Id.*, ¶15).

22. Another PPVA-related fund, PPNE, guaranteed another \$5,000,000 to \$7,000,000 of product via third party commitments. (*Id.*, ¶15).

23. The Collective suffered significant losses due to Atlantic Growth's failure to provide required and timely funding. (*Id.*, ¶16).

24. Brands that The Collective intended to purchase or grow were passed over and ignored. (*Id.*, ¶16).

25. New brands were developed in house to replace those The Collective could no longer afford to purchase, but even marginal marketing budgets were not available to build acceptance or awareness. (*Id.*, ¶16).

26. Additional failures include missed deliveries, excess handling and processing costs, and the loss of critical personnel. (*Id.*, ¶16).

27. The Collective could not meet the majority of the orders placed by wholesale and retail establishments, thereby breaching its contractual obligations to them and to the partner brands it engaged. (*Id.*, ¶17).

28. The Collective was also often not able to meet its timely obligations to suppliers, and, as such, could not purchase apparel or goods with the same credit lines it had historically enjoyed. (*Id.*, ¶18).

29. The Collective ultimately stopped paying interest on its loans from Atlantic by mutual agreement. (*Id.*, ¶19).

30. PPVA understood and accepted responsibility for the circumstance it had created. (*Id.*, ¶19).

31. However, it also required that The Collective not pay West Loop for their outstanding payables. Even though West Loop's invoices were significant both in dollar amount and age. (*Id.*, ¶19).

32. PPVA insisted on the requirement that The Collective not pay West Loop, because it is owned by my relatives. (*Id.*, ¶19).

33. Despite the adversity there were still positive signs that The Collective's business model had merit. (*Id.*, ¶20).

34. Despite low stock levels and the change out of the Ecko name to The Collective's new concept name, SlamXHype, Mr. Gerszberg saw improved margin and sell through rates on our new deliveries. (*Id.*, ¶20).

35. A significantly high number of our new and partner brands gained both acceptance and strong sell throughs. (*Id.*, ¶20).

36. Customers often demanded discounts on late deliveries but merchandise was often still accepted and performance was noteworthy. (*Id.*, ¶20).

37. This forced the Collective into a precarious position; the Back-to School and Holiday seasons are peak selling periods. (*Id.*, ¶21).

38. It was critical for The Collective to meet its obligations to suppliers in order to generate profit during its peak selling periods. (*Id.*, ¶21).

39. Trying to revive The Collective, Mr. Gerszberg began seeking funds from various other investors to purchase inventory. (*Id.*, ¶22).

40. Mr. Gerszberg also reached out to PPVA as it had a fifty percent (50%) ownership interest in The Collective (via Atlantic Growth), and Atlantic Growth owed The Collective approximately \$25 million. (*Id.*, ¶23).

41. In an email to Nordlicht dated August 10, 2015, Mr. Gerszberg laid out the opportunities for The Collective to realize profits during its peak sales period. (*Id.*, ¶24, Exh. 2).

42. In response, Nordlicht suggested that an agreement be entered with the Finkelmans - who operate and control the entities West Loop and Epocs Real Estate Partnership, Ltd., (“Epocs”)— whereby West Loop/Epocs would provide the money that was initially promised by Atlantic Growth to The Collective, so that The Collective could purchase the necessary apparel to fill its stores and orders (the “West Loop/Epocs Obligations”). (*Id.*, ¶25).

43. In exchange for the loan from West Loop/Epocs, PPVA agreed to increase the funding from Atlantic Growth to \$20 million paid, leaving \$20 million still unpaid. (*Id.*, ¶26).

44. In addition, PPVA granted West Loop/Epocs a security interest in the PPNE Notes as guarantee of The Collective’s obligations to West Loop/Epocs. (*Id.*, ¶27).

45. That security interest was granted on August 12, 2015. (*Id.*, ¶27).

46. On October 13, 2015, The Collective and West Loop/Epocs entered into an Inventory Purchase and Sale Agreement. (*Id.*, ¶28).

47. Despite The Collective’s significant efforts, at additional cost, The Collective 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. (*Id.*, ¶29).

48. 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. (*Id.*, ¶30).

49. By December of 2015 Rosenthal, PPVA, and Mr. Gerszberg all agreed to liquidate the business. (*Id.*, ¶31).

50. Mr. Gerszberg chose not to sue and instead, focused his efforts on meeting his going forward obligation and making sure his creditors were repaid. (*Id.*, ¶32).

51. Mr. Nordlicht agreed to release Mr. Gerszberg from his personal guarantees and to accept responsibility for \$2 million of the outstanding Rosenthal debt of \$4 million. (*Id.*, ¶32).

52. JLIP, LLC, (“JLIP”), (another company Mr. Gerszberg operated), owned intellectual property (“IP”) rights relating to water, technology throughout the US and certain foreign countries. (*Id.*, ¶33).

53. Mr. Gerszberg personally invested \$6 million in JLIP. (*Id.*, ¶33).

54. The only other global IP holder of hydro-flight technology was a group of companies created by a French inventor named Franky Zapata (“Mr. Zapata”), and his company, Zapata Holdings (“Zapata”), which owned certain intellectual property rights relating to water and air technology. (*Id.*, ¶34).

55. Mr. Gerszberg had discussed with Mr. Zapata different structures for merging the JLIP IP with the Zapata operating business. (*Id.*, ¶35).

56. In April 2016, Mr. Zapata evolved the company to include jet propulsion to fly with air and not just water, and which had enormous potential for military application. (*Id.*, ¶36).

57. Thus, on or around June 3, 2016, Spectrum 30, LLC (“Spectrum 30”), Mr. Zapata, and Mr. Gerszberg entered into a Master Agreement for the Unification of Zapata and JLIP (“the Zapata Agreement”). (*Id.*, ¶37; **Exh. C**).

58. Pursuant to the Zapata Agreement, Spectrum 30, Mr. Zapata, and Mr. Gerszberg, formed a new business to own the IP rights of JLIP and Zapata. (*Id.*, ¶38).

59. 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. (*Id.*, ¶38).

60. 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. (*Id.*, ¶39).

61. PPVA and/or PPVA subsidiaries, had a majority stake (approximately 60% with debt convertible notes and warrants) in Implant Sciences Corporation ("IMSC"), which was a publicly traded company that sold explosive trace detection technology to airports globally. (*Id.*, ¶40).

62. The company had too much debt and believed that its technology was better served as sold with other security products. (*Id.*, ¶40).

63. The decision was made to sell the trace technology business and use the remaining proceeds, after the repayment of debt, to purchase a new military or security-oriented product that would increase shareholder value and demonstrate growth. (*Id.*, ¶40).

64. One of the strategies that was proposed was a reverse merger between IMSC and Zapata, as PPVA viewed a reverse merger of IMSC as creating the highest potential financial outcome for the IMSC business. (*Id.*, ¶41).

65. Accordingly, in May of 2016, managers of PPVA introduced Mr. Gerszberg to the President of IMSC, Robert Liscouski ("Mr. Liscouski"), and they discussed the potential acquisition of Zapata. (*Id.*, ¶42).

66. The Zapata deal was one of many deals being considered by IMSC and PPVA. (*Id.*, ¶43).

67. Zapata was also getting many inquiries from various potential companies and venture capitalists. (*Id.*, ¶44).



68. Mr. Gerszberg had not initially sought financing for Spectrum30 under the Zapata Agreement and Mr. Gerszberg had met up with a few investors that were interested in investing in Zapata. (*Id.*, ¶45).

69. Nordlicht explained the unique circumstance that existed with IMSC. (*Id.*, ¶46).

70. 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. (*Id.*, ¶46).

71. 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 its hydro flight recreational business, seemed to be a recipe for a great increase in stock value. (*Id.*, ¶46).

72. This position was further validated by attorneys as well as the IMSC board and the IMSC attorneys. (*Id.*, ¶46).

73. Pursuant to the proposed transaction, after the reverse merger Spectrum30 would own 60% and existing IMSC shareholders would have 40%. (*Id.*, ¶47).

74. PPVA would have warrants and options totaling 60% or approximately \$140 million. (*Id.*, ¶47).

75. While the reverse merger made sense conceptually, 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 to Mr. Gerszberg in the aftermath of the Atlantic Growth/The Collective deal. (*Id.*, ¶48).

76. Mr. Gerszberg expressed this concern and his inability to enter a new investment with PPVA's involvement without ensuring West Loop/Epocs would be repaid. (*Id.*, ¶48).

77. Mr. Gerszberg expressed his concerns to PPVA as one of the reasons he was considering the other investors interested in a deal with Zapata. (*Id.*, ¶49).

78. After the collapse of The Collective, West Loop sought to collect its payment from PPVA as guarantors of The Collective. (*Id.*, ¶50).

79. Because PPVA was yet to satisfy its obligations as guarantor, West Loop/Epocs threatened to bring legal action against PPVA. (*Id.*, ¶50).

80. 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/Epocs. (*Id.*, ¶51).

81. In exchange, Mr. Gerszberg agreed to finalize the proposed reverse merger between Zapata and IMSC. (*Id.*, ¶51).

82. Further, because Mr. Gerszberg would not do an IMSC deal without repayment to West Loop/Epocs as consideration, PPVA agreed that West Loop/Epocs would be repaid from the proceeds of the IMSC/Zapata profits. (*Id.*, ¶52).

83. Mr. Gerszberg negotiated that a precondition to the Huron Loan Document include a provision that allowed me to offset the money owed to West Loop/Epocs prior to PPVA's repayment. (*Id.*, ¶53).

84. 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. (*Id.*, ¶54).

85. 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"). (*Id.*, ¶55; **Exh. 4**).

86. As set forth in the Huron Loan Document, Mr. Gerszberg had 30 days to complete all the related conditions-precedent in order to effectuate the agreement reached between the parties, including a forbearance and security agreement. (*Id.*, ¶56).

87. In the second half of June 2016, Mr. Gerszberg directed his attorneys to begin drafting the relevant documents. (*Id.*, ¶57).

88. Nordlicht and PPVA's team insisted that West Loop/Epocs agree to forbear from exercising its rights against PPVA. (*Id.*, ¶57).

89. The forbearance was a practical matter of being reasonable in light of the consideration Mr. Gerszberg was being given. (*Id.*, ¶57).

90. On July 5, 2016, the parties executed a Forbearance and Security Agreement. (*Id.*, ¶58; **Exh. 5**).

91. The execution of the Forbearance and Security Agreement on July 5, 2016 was a fulfilment of one of the many activities necessary to be completed by Mr. Gerszberg within 30 days under the Huron Loan Document. (*Id.*, ¶59).

Dated: February 14, 2020

*s/ Elliot D. Ostrove*

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Elliot D. Ostrove  
EPSTEIN OSTROVE, LLC 200  
Metroplex Drive, Suite 304  
Edison, New Jersey 08817

and

43 West 43<sup>rd</sup> Street, Suite 139  
New York, NY 10036  
Telephone: 646-300-8600  
Attorneys for Defendant  
*Seth Gerszberg*