UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

DEFENDANT'S, SETH GERSZBERG, MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

Defendant, Seth Gerszberg ("Mr. Gerszberg"), submits this memorandum of law in further support of his Motion to Dismiss Plaintiffs' Second Amended Complaint ("SAC") pursuant to *Fed. R. Civ. P.* 12(b)(6) (the "Motion to Dismiss"). As he had joined in the other Motions to Dismiss filed at the same time as his, Mr. Gerszberg joins with those Defendants' Replies in Further Support of their Motions to Dismiss, filed contemporaneously herewith.

As a threshold matter, a review of the several Motions to Dismiss filed contemporaneously with this and the Opposition to them filed by Plaintiffs reveals the inescapable conclusion that Plaintiffs lack standing to bring their claims against Mr. Gerszberg. The *Wagoner* rule and the doctrine of *in pari delicto* each bars the claims brought by Plaintiffs against Mr. Gerszberg. *Shearson Lehman Hutton, Inc., v. Wagoner,* 944 F.2d 114 (2d. Cir. 1991), *In re Lehr Constr. Corp.*, 551 B.R. 732, 738 (S.D.N.Y. 2016) (*quoting Kirschner v. KPMG LLP*, 938 N.E.2d 941, 950 (N.Y. 2010) *aff'd* 666 F. App'x 66 (2d Cir. 2016).[1]

Even if the Court somehow finds Plaintiffs have the requisite standing to bring claims against Mr. Gerszberg, Plaintiffs admit they do not meet the pleading requirements of *Fed. R. Civ. P*. 9(b). As such, their claims fail. While Plaintiffs freely admit in their opposition that *Fed. R. Civ. P.* 9(b) imposes a heightened standard, Plaintiffs' Opposition makes no effort to address the questions of "who," "what," when," "where," and "how" of Plaintiffs' two claims against Mr. Gerszberg for Aiding and Abetting Breach of Fiduciary Duty (Count Thirteen) and Unjust Enrichment (Count Fourteen). *See* Plntfs' Opp. at 3. Plaintiffs' Opposition fails to even address, let alone discredit, the detailed arguments raised in Mr. Gerszberg's Motion to Dismiss. Indeed,

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[1] Mr. Gerszberg joined in the Motions to Dismiss filed by the other Defendants where the *Wagoner* rule and *in pari delicto* doctrine was discussed at length. *See* Gerszberg Mem. at p. 2.

effectively admitting that they really do not know why they have named Mr. Gerszberg as a Defendant, Plaintiffs' Opposition does little more than selectively parse Counts Thirteen and Fourteen from Plaintiffs' SAC. *See* Plntfs' Opp. at 41-42. Notwithstanding that Plaintiffs' SAC spans 194 Pages and includes 1041 Paragraphs, Plaintiffs devote barely 6 Paragraphs of their 58-page Opposition to Mr. Gerszberg's Motion to Dismiss. *See* Plntfs' Opp. at 41-43. Given the opportunity to demonstrate the merits of their claims against Mr. Gerszberg, Plaintiffs Opposition fails to do anything more than suggest that the Court lump Mr. Gerszberg together with other allegedly bad actors, and as such, assign guilt to Mr. Gerszberg, too. The failings of Plaintiffs' SAC and Opposition are clear. Plaintiffs cannot articulate what they think are their claims against Mr. Gerszberg – a failing that is fatal to their efforts to include him in the SAC.

II. FACTS[2] AND LEGAL ARGUMENT

A. Legal Standard

To survive a motion to dismiss under *Fed. R. Civ. P.* 12(b)(6), a plaintiff must "state a claim to relief that is plausible on its face." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations and quotations omitted). The complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007). "While the Court must take as true all well-plead facts, conclusory allegations must be disregarded." *See Pollio v. MF Global, Ltd.*, 608 F. Supp. 2d 564, 572 (S.D.N.Y. 2009) (internal citations omitted). Under *Iqbal*, allegations such as that the defendant "knew of, condoned, [or] willfully and maliciously agreed to" some course of misconduct fails to state a claim. *Iqbal*, 556 U.S. at 680.

[2] In the interest of brevity, the Court is referred to Mr. Gerszberg's moving papers for a full recitation of facts, and incorporates all terms used therein.

Where, as here, the claims sound in fraud, the heightened pleading standard requires the underlying circumstances to be plead with particularity. *See Fed. R. Civ. P.* 9(b). Plaintiffs' factual allegations must reflect the "who, what, when, where and how of the alleged fraud." *Bauman v. Mount Sinai Hosp.*, 452 F. Supp. 2d 490, 503 (S.D.N.Y. 2006) (internal citation and quotation marks omitted). The heightened pleading standard applies to a claim for aid and abetting a breach of fiduciary duty that involves an alleged fraud. *See Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2013); see also *Decker v. Massey-Ferguson Ltd.*, 681 F.2d 111, 119 (2d Cir. 1982); *Marino v. Grupo Mundial Tenedora, S.A.*, 810 F. Supp. 2d 601, 614 (S.D.N.Y. 2011). Similarly, the heightened pleading requirement applies to claims of unjust enrichment that are "based on the same predicate allegations relating to a fraudulent scheme" that form the gravamen of a complaint. *See DeBlasio v. Merrill Lynch & Co.*, No. 07 Civ. 318 (RJS), 2009 U.S. Dist. LEXIS 64848, at *35-36, 39 (S.D.N.Y. July 27, 2009).

In Opposition to Mr. Gerszberg's 29-page Motion to Dismiss, Plaintiffs present the Court with a mere 6-paragraphs. Plaintiffs' Opposition is devoid of any citations or references to the SAC that satisfy the heightened pleading requirement, and as such, Plaintiffs' Opposition necessarily admits that Plaintiffs cannot satisfy the requirements of *Fed. R. Civ. P.* 9(b). Mr. Gerszberg's Motion to Dismiss should be granted.

B. Plaintiffs' SAC Against Mr. Gerszberg Should be Dismissed Because Plaintiffs Do Not Have Standing Pursuant to the *Wagoner* Rule and the Doctrine of *In Pari Delicto*

The *Wagoner* rule provides that, under New York law, a bankruptcy trustee may only "assert claims held by the bankrupt corporation itself," and lacks standing to assert "a claim against a third party for defrauding a corporation with the cooperation of management" on behalf of the "guilty corporation." *Wagoner*, 944 F.2d at 118, 120. The *Wagoner* rule applies equally to a

liquidator who similarly stands in the shoes of the creditors. *See Bullmore Ernst & Young Cayman Islands*, 861 N.Y.S.2d 571, 581 (Sup. Ct. N.Y. Ct. 2008); *cf. Cobalt Multifamily Inv'rs I, LLC v. Shapiro*, 857 F. Supp. 2d 419, 440 (S.D.N.Y. 2012). The *Wagoner* rule is a rule of standing that should be resolved at the earliest opportunity. *Wagoner*, 944 F.2d at 117. Indeed, courts do not hesitate to apply *Wagoner* to dismiss deficient claims based on the pleadings. *See e.g*, *Picard v. HSBC Bank PLC,* 454 B.R. 25 at 37 (S.D.N.Y. 2011), *amended sub nom., In re Bernard L. Madoff Inv. Sec. LLC*, ADV 08-1789 (BRL), 2011 WL 3477177 (S.D.N.Y. Aug. 8, 2011) *aff'd* 721 F.3d 54 (2d Cir. 2013).

Here, dismissal under *Rule* 12(b) is appropriate because the allegations in the SAC demonstrate that Plaintiffs lack standing to sue Mr. Gerszberg under the *Wagoner* Rule. Plaintiffs allege fraud against virtually everyone who purportedly controlled or had any meaningful position in PPVA's operations, and affirmatively allege that PPVA's own officers and directors were aware of, and involved in, the conduct for which Plaintiffs seek to hold Mr. Gerszberg responsible. (SAC ¶¶12, 48, 134, 728, 932). Because the claims against Mr. Gerszberg are based on the alleged collaboration with PPVA's officers and directors, such claims are barred under the *Wagoner* rule.

Similarly, Plaintiffs' claims against Mr. Gerszberg are barred by the *in pari delicto* doctrine, which "prevents a party from seeking to recover against others for a wrong in which the party participated or is deemed through imputation to have participated." *ICP Strategic Credit Income Fund Ltd. v. DLA Piper, LLP (US)*, 730 F. App'x 78, 8 (2d Cir. 2018). New York law defines the doctrine "extremely broadly." *Picard*, 454 B.R. at 37. The doctrine is "so strong," in fact, that it controls "even in difficult cases and should not be weakened by exceptions." *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 (2010). The Second Circuit has held that "early resolution is appropriate where, as here, the outcome is plain on the face of the pleadings." *In re Bernard L.*

Madoff Inv. Sec. LLC., 721 F.3d at 65. Here, the doctrine is triggered by Plaintiffs' allegations that PPVA (through its agents) acted wrongfully.

Plaintiffs argue in their Opposition that neither the *Wagoner* nor the *in pari delicto* doctrine applies to claims, against "insiders, including persons and entities who were fiduciaries, who exercised management and control over PPVA and its assets and/or were alter egos of such insiders." *See* Plntfs' Opp. at 4. However, even assuming Plaintiffs are correct on that statement of law, through the deficiencies of their own pleading and its failure to address its claims against Mr. Gerszberg in their Opposition to his Motion to Dismiss, Plaintiffs admit that Mr. Gerszberg does not qualify as an "insider" or an alter ego of an insider. As such, Plaintiffs' claims against Mr. Gerszberg should be dismissed.

Nowhere in the 194-page SAC is Mr. Gerszberg referred to as an employee, fiduciary, or alter ego of any of the alleged insiders of PPVA. Plaintiffs admit they cannot allege that Mr. Gerszberg is an insider or is in any way related to this case, so they grouped Mr. Gerszberg in with the other alleged bad actors. By doing so, Plaintiffs have failed to satisfy the particularity requirements for the claims against Mr. Gerszberg.[3] Plaintiffs refer to Mr. Gerszberg as a "close friend of Mr. Nordicht" and state later that Mr. Gerszberg was brought on as an "informal advisor." (SAC ¶¶728, 929). Using such opaque words cannot confer on Mr. Gerszberg "insider" status. At best, the SAC alleges that Mr. Gerszberg was a close friend of Mr. Nordicht and had entered into a loan transaction with PPVA. Surely, being Mr. Nordicht's "close friend" or entering into a loan transaction with PPVA does not make Mr. Gerszberg an insider.

[3] *See also In Re Alstom SA*, 406 F. Supp. 2d 433, 449 (S.D.N.Y. 2005) ("In order to invoke the group pleading doctrine against a particular defendant the complaint must allege facts indicating that the defendant was a corporate insider, with direct involvement in day-to-day affairs, at the entity issuing the statement.").

Applying the "control analysis" as set forth in Plaintiffs' Opposition, it becomes clear that Plaintiffs' claims are barred by the *Wagoner* rule and *in pari delicto* doctrine. The "control analysis" for purposes of *Wagoner*/*in pari delicto* focuses not on what fraudulent conduct the defendant committed, if any, but solely on whether the defendant had enough control over the debtor to give him or her an opportunity to engage in that bad conduct. *See* Plntfs' Opp. at 5. The SAC is devoid of any facts that Mr. Gerszberg held a position of authority in PPVA or exerted any sort of control over PPVA to be deemed an insider. It is clear from the facts alleged in the SAC that Mr. Gerszberg (i) was not a fiduciary of PPVA; (ii) did not exercise management and control over PPVA and its assets; and (iii) was not an alter ego of any insiders. (*See* SAC ¶¶728, 749, 929). As such, this Court should grant Mr. Gerszberg's Motion to Dismiss Counts Thirteen and Fourteen, with Prejudice.

C. Plaintiffs' SAC Against Mr. Gerszberg Should be Dismissed Because Plaintiffs Fail to Set forth a Claim for Unjust Enrichment

Plaintiffs' SAC fails to set forth a claim for unjust enrichment against Mr. Gerszberg. A claim for unjust enrichment cannot succeed where an express contract governs the parties' relationship. *See e.g. Curtis Properties Corp. v. Grief Companies*, 236 A.d2d 237, 239 (1st Dept. 1997). Even Plaintiffs' SAC makes repeated reference to a contract between the Parties and goes so far to include an Agreement – the Zapata Master Agreement - as an Exhibit to the SAC – albeit the wrong document.[4] Plaintiffs admit the existence of a contract but hide behind their made-up accusation that the contract in question was Mr. Gerszberg's attempt to "paper" over the transaction – an assertion made without any basis in any facts alleged. *See* Plntfs' Opp. at 42.

[4] Attached as Exhibit 101 to the SAC is the "Zapata Master Agreement," when in fact, the Huron/Spectrum 30 Agreement accurately described the "rights and duties of Gerszberg, Zapata, and their affiliates." *See* Gerszberg Aff., **Exh. D.** Had Plaintiffs referred to the correct document, they could not, in good faith, raise any claim of lack of consideration.

Notably, Plaintiffs cannot, and do not, cite to, or make reference to, a single paragraph in their SAC to support their newly-made-up position. *See generally* Plntfs' Opp. at 42. Plaintiffs cannot have it both ways. No amendment or discovery can cure this defect, and as such, Plaintiffs' claim for Unjust Enrichment against Mr. Gerszberg must be dismissed.

Further, Plaintiffs' SAC alleges that the Mr. Gerszberg "effectuated" a transfer of $15 million to "a Gerszberg-controlled entity for no consideration." (SAC ¶751). Plaintiffs are wrong. Even a cursory review of the Secured Note between Spectrum30 and Huron Capital LLC reveals the consideration in exchange for the money.[5] *See* Gerszberg Aff., **Exh. D**. It is indisputable that the Huron Agreement – an express written contract; the Second Note; and the Amendment to Secured Note, govern the transaction. *See e.g. Curtis Properties Corp.*, 236 A.d2d at 239 (concluding that a claim for unjust enrichment cannot succeed where an express contract governs the parties' relationship.).

Even if the Court considers Plaintiffs' assertion (again, without citation), that the "SAC alleges the contemporaneous transfer of $15 million in funds directly from PPVA to Gerszberg," Plaintiffs' claim is simply too attenuated. A well-plead claim for unjust enrichment "requires some type of direct dealing or actual substantive relationship" between the Plaintiffs and Defendant. *See Laydon v. Mizuho Bank, Ltd.*, Civ. No. 12-cv-3419 (GBD), 2014 U.S. Dist. LEXIS 46368 at *42 (S.D.N.Y. March 28, 2014). Here, the SAC does not plead any facts that would support a finding that there was a "substantive relationship" between Mr. Gerszberg and PPVA;[6] that Mr. Gerszberg was involved in the underlying alleged fraud perpetrated by PPVA; or that Mr. Gerszberg was enriched at PPVA's expense. Indeed, Plaintiffs' Opposition, a mere 4-sentence paragraph, does not refute Mr. Gerszberg's argument that Plaintiffs' claim for unjust enrichment is too attenuated,

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[5] *See supra* footnote 4.

[6] Plaintiffs' SAC refers to Mr. Gerszberg as only a "close friend" and "informal advisor." (SAC ¶¶728, 929).

but, rather, merely recites the SAC's conclusory allegations. *See* Plntfs' Opp. at 42. The facts as alleged and documented leads only to the conclusion that an allegedly Gerszberg-controlled entity received a loan that is not yet due. Plaintiffs simply fail to explain how receiving a loan that must be repaid is wrongful. Plaintiffs' claim for Unjust Enrichment (Count Fourteen) against Mr. Gerszberg should be dismissed.

D. Plaintiffs' SAC Against Mr. Gerszberg Should be Dismissed Because Plaintiffs Fail to Set forth a Claim for Aiding and Abetting Breach of Fiduciary Duty

"A claim for aiding and abetting a breach of fiduciary duty requires, *inter alia*, that the Defendant knowingly induced or participated in the breach." *Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2012). "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." *Id.* Rather than point to specific factual allegations, or cite to the SAC, Plaintiffs offer only the same bald conclusory statements in a 1-paragraph Opposition that "Plaintiffs have sufficiently pled a claim for aiding and abetting breach of fiduciary duty" and that "Mr. Gerszberg had detailed knowledge of PPVA's financial condition[.]" *See* Plntfs' Opp. at 42. No matter how many times Plaintiffs repeat that Mr. Gerszberg had knowledge, rhetoric cannot substitute for facts. *See Iqbal*, 556 U.S. at 678 (To survive a motion to dismiss under *Fed. R. Civ. P.* 12(b)(6), a plaintiff must "state a claim to relief that is plausible on its face.").

1. <u>Plaintiffs Have Failed to Demonstrate that Mr. Gerszberg had "actual knowledge."</u>

At best, Plaintiffs proffer that "[Mr.] Gerszberg had detailed knowledge of PPVA's financial condition." *See* Plntfs' Opp. at 42. *When? Where? How?* While the SAC may try to posit a theory of guilt by association with respect to Mr. Gerzsberg, it wholly fails to plausibly allege that Mr. Gerzsberg had any knowledge of PPVA's and/or the Platinum Defendants' alleged

breach of fiduciary duties. Indeed, Mr. Gerszberg is alleged only to be a "close friend" of Michael Nordlicht. (SAC ¶728). Without reference to anything other than conclusory statements, Plaintiffs' claims are insufficient to impute actual knowledge to Mr. Gerszberg, and as such, the SAC fails to state a claim for Aiding and Abetting Breach of Fiduciary Duty against Mr. Gerszberg. *See Iqbal*, 556 U.S. at 680 (Allegations such as that the defendant "knew of, condoned, [or] willfully and maliciously agreed to" some course of misconduct fails to state a claim).

2. Plaintiffs Have Failed to Demonstrate that Mr. Gerszberg provided "substantial assistance."

As the Second Circuit has explained, 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 a breach to occur." *See In re Sharp Int'l Corp.*, 403 F.3d 53, 50 (2d Cir. 2005).[7] Here, the claims against Mr. Gerszberg are that he allegedly "aided and abetted the Platinum Defendants' breaches of their fiduciary obligations to PPVA in connection with the Second Scheme" by:

> (i) causing PPVA to allegedly incur significant liabilities due to the Purported Underlying West Loop/Epocs Obligations; (ii) negotiating certain Second Scheme Transactions on behalf of the Platinum Defendants; (iii) negotiating and drafting the Forbearance and Security Agreement on behalf of West Loop/Epocs; and (iv) directing the transfer of $15 million in Agera Sale proceeds to himself (via Spectrum30) and Franky Zapata, all of which actions were a detriment to PPVA and its subsidiaries."

(SAC ¶932). Without more, Plaintiffs' SAC is devoid of any reference to facts that would support the Plaintiffs' conclusions that Mr. Gerszberg provided "substantial assistance" to PPVA and/or the Platinum Defendants. Indeed, Plaintiffs' allegations of "substantial assistance" add up to half-

[7] Notwithstanding the fact that Mr. Gerszberg's Motion to Dismiss repeatedly discusses, and cites to *In Re Sharp Int'l Corp.*, at length in its moving brief, Plaintiffs' Opposition fails to distinguish, let alone address, this highly relevant and precedential case. *Compare* Dfnts' Mem. at 17-27 to Plntfs' Opp. *generally*.

hearted phrases such as "provided" (SAC ¶726); "advised" (SAC ¶743); "began to consult" (SAC ¶742); "orchestrated" (SAC ¶750) and "conspired with" (SAC ¶751), without any specificity or details of actual participation by Mr. Gerszberg as an aider and abettor. Even if the Court assumed all the facts as alleged in the SAC to be true, the SAC says nothing more than Mr. Gerszberg took measures to "extricate" himself "from peril." *See In Re Sharp Int'l Corp.*, 403 F.3d at 51 ("We conclude that the complaint says no more than that State Street relied on its own wits and resources to extricate itself from peril, without warning persons it had no duty to warn."); s*ee also Iqbal*, 556 U.S. at 678 (To survive a motion to dismiss, a plaintiff must "state a claim to relief that is plausible on its face."). For all the reasons set forth in Mr. Gerszberg's moving papers – addressing each of the 4 purported breaches separately (*See* Dfnts' Mem. at 17-28), and for those reasons set forth above, Plaintiffs have said nothing in the SAC, and done little in their Opposition, to support Plaintiffs' claims that Mr. Gerszberg "substantially assisted" PPVA and/or the Platinum Defendants' breaches of fiduciary duty. As such, Plaintiffs' claim must fail.

III. CONCLUSION

For all the reasons set forth in Mr. Gerszberg's moving papers and for the reasons set forth above, this Court should grant Mr. Gerszberg's Motion to Dismiss, and dismiss Counts Thirteen and Fourteen as against Mr. Gerszberg, with prejudice.

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