UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PLATINUM-BEECHWOOD LITIGATION.	Civil Action No. 18-cv-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, - against - PLATINUM MANAGEMENT (NY) LLC, *et al.*, Defendants.	Civil Action No. 18-cv-10936 (JSR)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO SETH GERSZBERG'S MOTION FOR RECONSIDERATION

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Plaintiffs 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**") submit this Memorandum of Law in opposition to the motion of Defendant Seth Gerszberg ("**Gerszberg**") for reconsideration of this Court's June 21, 2019 Decision. *See* ECF No. 408.

OVERVIEW

It is well settled that "reconsideration of a previous order is an extraordinary remedy to be employed sparingly," that the "standard for reconsideration is 'strict' and that a motion for reconsideration will be denied "unless the moving party can point to controlling decisions" that "the court overlooked … that might reasonably be expected to alter the conclusion reached by the court." *Silverman v. Payward, Inc*., 19-CV-2997 (JSR), 2019 WL 3242347, *1 (S.D.N.Y. June 24, 2019) (citing *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995)).

By his motion for reconsideration, Gerszberg asserts that this Court overlooked the decision in *In re Sharp Int'l Corp*., 403 F.3d 50, 53 (2d Cir. 2005 ("*Sharp*"), and cases following *Sharp* in denying Gerszberg's motion to dismiss Plaintiffs' Thirteen Cause of Action for aiding and abetting a breach of fiduciary duty and Plaintiffs' Fourteenth Cause of Action for unjust enrichment. *See* Gerszberg Memorandum, ECF No. 427-1 ("**Gerszberg Mem**."). Gerszberg cannot make this argument because *Sharp* was the key case cited in Gerszberg's moving memorandum of law and reply memorandum on his original motion to dismiss the claims against him, and this Court roundly rejected Gerszberg's arguments based on the *Sharp* decision.

Gerszberg's reconsideration motion is merely a recitation of the identical argument made in his motion to dismiss. His argument that the Court must have "overlooked" *Sharp* because the Court did not specifically discuss *Sharp* is erroneous. The motion for reconsideration must be denied because it is nothing more than a rehash of the same argument that this Court rejected. *See*

Point II, *infra,* pp. 6-8. Moreover, and, in any event, *Sharp* and the other authority cited by Gerszberg is not controlling on the issues. *See* Point III, *infra,* pp. 8-15. Thus, Gerszberg has failed to satisfy the strict and high standard required for a motion for reconsideration, and his motion should be denied in full.

The Court's June 21, 2019 Decision

The Court's June 21, 2019 Decision (the "**Decision**") analyzed in detail the Thirteenth and Fourteenth Counts of the Second Amended Complaint ("**SAC**") against Gerszberg for aiding and abetting breach of fiduciary duties and unjust enrichment, respectively. *See In re Platinum-Beechwood Litigation*, 18-cv-6658 (JSR), 18-cv-10936 (JSR), 2019 WL 2569653 (S.D.N.Y. June 21, 2019). In describing the allegations against Gerszberg in the SAC, which must be accepted as true on a motion to dismiss, the Court stated as follows (*id.* at *13):

> The SAC alleges that Gerszberg ran an apparel business called the Collective, which took out a $30 million line of credit from Atlantic Growth, a PPVA subsidiary. SAC ¶¶ 729-30. The Collective also entered into a series of agreements with a company called West Loop, but by the summer of 2015, the Collective was unable to make payments to Atlantic Growth and was in $2.4 million of debt to West Loop. Id. ¶¶ 731-34. Gerszberg was close friends with Mark Nordlicht, and he approached Nordlicht for help. Id. ¶ 735. Thereafter, the Platinum Defendants declined to foreclose on their loans to Gerszberg, and they instead caused PPVA to enter into a series of transactions with West Loop and a company called Epocs that "solely benefit[ted] West Loop/Epocs, Gerszberg and The Collective, to the detriment of PPVA." Id. ¶¶ 736-37.
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> Specifically, the SAC alleges that PPVA assumed the Collective's debt to West Loop and granted West Loop an interest in a promissory note issued by PPVA (the "12% PPNE Note"). Id. ¶ 738. PPVA also incurred a "sham" loan obligation to Epocs, pursuant to which the loan proceeds were given to the Collective and Epocs was given an interest in the 12% PPNE Note. Id. Finally, PPVA guaranteed an obligation that the Collective owed to West Loop. Id. Together, these transactions are referred to in the SAC as the "Purported Underlying West Loop/Epocs Obligations." Id.

> The SAC also alleges that "Gerszberg was provided with information concerning PPVA's financial condition, its ongoing liquidity issues and the misrepresentation of its NAV by the Platinum Defendants." Id. ¶ 744. According to the SAC, however, Gerszberg nevertheless drafted a "Forbearance and Security Agreement" on behalf of West Loop and Epocs that gave these companies a security interest in the rights that PPVA's subsidiary DMRJ had to proceeds from the sale of IMSC. Id. ¶¶ 747-49.
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> Finally, the SAC alleges that Gerszberg and the Platinum Defendants conspired to transfer $15 million from the Agera Sale to Gerszberg and entities he controlled for no consideration. The SAC alleges that Gerszberg and an individual named Franky Zapata entered into an agreement - the "Zapata Master Agreement" - that concerned "the rights and duties of Gerszberg, Zapata and their affiliates upon the occurrence of a proposed merger between Zapata Industries and IMSC." Id. ¶¶ 752, 754. For the Zapata Master Agreement to become effective, a Gerszberg-controlled entity called Spectrum30 needed to deposit €10 million into Zapata's bank account. Id. ¶ 755. On the day the Agera transaction closed, a PPVA subsidiary called Huron transferred $15 million of the proceeds to Gerszberg and Spectrum30 (the "Spectrum30 Loan"), and $11 million was wired to Zapata. Id. ¶ 756. The SAC alleges that PPVA had no obligation under the Zapata Master Agreement to transfer these funds, and that it received nothing in return. Id. ¶ 757.

The Court denied Gerszberg's motion to dismiss in its entirety except that it dismissed Plaintiffs' unjust enrichment claim "only insofar as it relates to the Spectrum30 Loan." *Id.* at *15 In denying the motion, the Court made the following critical holdings.

First, the Court held that "plaintiffs' claims against Gerszberg are not barred by *Wagoner* and *in pari delicto* because the adverse interest exception applies, stating (*id.* at *14):

> Through the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, and the Spectrum30 Loan, *Gerszberg and his affiliates were allegedly awarded various financial benefits at the expense of PPVA. These benefits were awarded without consideration and unambiguously "operated at [PPVA's] expense." Kirschner, 938 N.E.2d at 952. (Emphasis added).*

Second, although the Court agreed with Gerszberg that the unjust enrichment claim is unavailable to PPVA to recover the $15 million loaned to Spectrum30[1] by a PPVA subsidiary, the Court held that "the Spectrum30 Loan is only one of several transactions through which plaintiffs allege that Gerszberg was unjustly enriched." (*Id.*).

Third, in denying Gerszberg's motion to dismiss the aiding and abetting the breach of fiduciary duty claim, the Court held that the SAC alleged that (a) Gerszberg had actual knowledge of the Platinum Defendants' breaches of fiduciary duties and (b) Gerszberg substantially assisted in the breaches of fiduciary duties, holding (*id.*):

> *The SAC plausibly alleges that Gerszberg engaged in multiple transactions that stripped PPVA of its value, and that he did so with actual knowledge of PPVA's financial difficulties and the Platinum Defendants' fiduciary breaches.* SAC ¶¶ 744, 749. Given the nature the transactions with which Gerszberg is charged, the SAC's allegations of knowledge are far from conclusory. *Moreover, the SAC adequately alleges that Gerszberg substantially assisted in the breaches that led to his enrichment and that he proximately caused the injuries that PPVA suffered. Indeed, it is hard to imagine how the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, or the Spectrum30 Loan would have happened without him.* (Emphasis added).

As shown below, Gerszberg has failed to demonstrate how the Court "overlooked" any controlling law in ruling as it did with respect to Gerszberg's motion to dismiss. Indeed, the Court's holdings are consistent with controlling law on these issues.

ARGUMENT

I. THE STANDARD FOR A MOTION FOR RECONSIDERATION

"Under Local Rule 6.3, a party moving for reconsideration 'must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion."' *Olaf Sööt Design, LLC v. Daktronics, Inc,* No. 15 Civ. 5024 (RWS), 2018 WL 6181360,

[1] All capitalized terms not defined herein shall have the meaning prescribed to them in the SAC.

at *1 (S.D.N.Y. Nov. 27, 2018) (Sweet, J.) (quoting *Eisenmann v. Greene*, 204 F.3d 393, 395 n. 2 (2d Cir. 2000)). The standard for granting a motion for reconsideration is "strict." *Id.* "Reconsideration of a court's previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Silverman*, 2019 WL 3242347 at *1 (citation omitted).[2]

A motion for reconsideration "is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple." *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012), as amended (July 13, 2012); *Shrader*, 70 F.3d at 257 ("[A] motion to reconsider should not be granted where the moving party seeks solely to relitigate an issue already decided."). To prevent a motion for reconsideration from becoming a "vehicle [] for taking a second bite at the apple," courts "must narrowly construe and strictly apply" the applicable standard. *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 43 F.Supp.3d 369, 373 (S.D.N.Y. 2014) (internal quotations and citation omitted). As this Court held in *Prout v. Vladeck*, 319 F. Supp. 3d 741, 744 (S.D.N.Y. 2018), "motions that 'simply regurgitate the arguments that this Court previously rejected' should be denied." (citation omitted). *See also In re JPMorgan Chase & Co. Deriv. Litig.*, No. 12 Civ. 03878 (GBD), 2014 WL 3778181, at *1 (S.D.N.Y. July 30, 2014) ("A motion for reconsideration is not

[2] Gerszberg also moves under Fed. R. Civ. P. 60(b). *Anders v. Verizon Communications, Inc.*, 16-CV-5654 (VSB), ~~2018 WL 16-5654 (VSB),~~ 2018 WL 6605200,*1 (~~S,D.N.Y~~S.D.N.Y. Dec. 17, 2018), a case cited in Gerszberg's Mem., p. 3, states:

> "Rule 60(b) provides 'extraordinary judicial relief' and can be granted 'only upon a showing of exceptional circumstances.'" *Kubicek v. Westchester Cty.*, No. 08 Civ. 372(ER), 2014 WL 4898479, at *1 (S.D.N.Y. Sept. 30, 2014) (quoting *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986)).

Gerszberg has made no showing of "exceptional circumstances" required for the "extraordinary judicial relief" under Fed. R. Civ. P. 60(b).

an opportunity 'to reargue those issues already considered when a party does not like the way the original motion was resolved'" (citation omitted)).[3]

II. GERSZBERG'S ARGUMENT BASED ON *SHARP*, WHICH WAS PRESENTED AND REJECTED ON THE MOTION TO DISMISS, IS NOT A PROPER BASIS FOR THE EXTRAORDINARY REMEDY OF RECONSIDERATION

Courts routinely and resoundingly deny motions for reconsideration like this one where, as here, a party has "raised nothing that was not previously considered, and rejected, by the Court, either explicitly or implicitly." *M.K.B. v. Eggleston*, No. 05 Civ. 10446 (JSR), 2006 WL 3230162, at *1 (S.D.N.Y. Nov. 7, 2006). Gerszberg cannot dispute that the arguments he raises in this motion for reconsideration were already raised in his motion to dismiss and that *Sharp* is the key case cited in this motion as well as his prior memoranda on his motion to dismiss. *Sharp* is cited nine (9) times in his motion for reconsideration. *See* ECF No. 427-1 at pp. 1, 2, 3, 4, 5 and 6.

Sharp was cited six (6) times in Gerszberg's moving memorandum of law and two (2) times in Gerszberg's reply memorandum of law. *See* ECF No. 334-1, at and ECF No. 393 at 9 and 10. Indeed, Gerszberg's reply memorandum of law stated that "[N]otwithstanding 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.*" *See* ECF No. 393 at 9, n. 7 (Emphasis added). Gerszberg's reply memorandum of law also stated (ECF. No. 393 at 10):

> 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 a duty to warn.

See also Gerszberg's moving memorandum of law (ECF No, 334-1) at 25.

[3] Gerszberg concedes that the standard for reconsideration is "high." (*See* Gerszberg Mem. at p. 3).

Contrary to Gerszberg's blithe protestations, this Court did not "overlook" the decision in *Sharp*. "The Court was not required to include an exhaustive account of its reasoning regarding every argument made by the parties," *Devinsky v. Kingsford*, No. 05 Civ. 2064 (PAC), 2008 WL 2704338, at *3 (S.D.N.Y. July 10, 2008), and "any arguments Plaintiff made that were not expressly rejected in the April 3 Order were rejected implicitly," *Liburd v. Bronx Lebanon Hosp. Ctr.*, No. 07 Civ. 11316 (HB), 2009 WL 1605783, at *3 (S.D.N.Y. June 9, 2009), *aff'd*, 372 Fed Appx. 137 (2d Cir. 2010). Given the extensive number of motions to dismiss and the complex and numerous issues involved on these motions, this Court was not required to address each argument made, including those made by Gerszberg, or to explain why *Sharp* (a) does not insulate Gerszberg from an aiding and abetting a breach of fiduciary duty claim or an unjust enrichment claim and (b) does not apply to the claims against Gerszberg.[4]

In short, Gerszberg's motion for reconsideration must be denied because it raises the identical argument based on the identical case (*Sharp*) made in his motion to dismiss. *See Prout*, 319 F.Supp.3d at 744 ("As an initial matter, defendants' motion for reconsideration does not even purport to bring any new cases to the Court's attention, and this by itself is a ground for denying this prong of their motion"); *Certain Underwriters at Lloyds of London v. Illinois National Insurance Company*, 09-CV-4418 (LAP), 2017 WL 10699406 (S.D.N.Y. Jan. 5, 2017) (denying motion for reconsideration where "ICSOP merely reiterates the arguments it made in the underlying motions, indeed relying on the same case it relied on in the original briefing"); *Domitz v. City of Long Beach*, CV16-1720, 2017 WL 6493236 (E.D.N.Y. Dec. 14, 2017) (reconsideration motion denied because "Plaintiff submits the exact same case law he put before the Court in his

[4] *Devinsky*, 2008 WL 2704338, at *3, "consisted of nearly twenty parties, an amended complaint with ten causes of action, and multiple cross motions to dismiss followed by multiple cross motions for summary judgment." The reasoning in *Devinsky* applies equally to this action involving a SAC with over twenty causes of action and more than ten separate motions to dismiss by more than twenty defendants.

opposition to the underlying motion to dismiss," noting that "[w]hile Plaintiff may be unhappy that the Court did not accept its interpretation and application of the case law he submitted, his assertion that the Court overlooked the case law is incorrect"); *B.D. Cooke & Partners Ltd. v. Certain Underwriters at Lloyd's, London*, No. 08 Civ. 3435 (RJH), 2010 WL 779783, at *3 (S.D.N.Y. Mar. 9, 2010) (denying motion for reconsideration where the moving party "raised precisely this point in its original motion papers" and "the Court implicitly rejected it" (citations omitted)).

Moreover, the few additional cases cited in this reconsideration motion[5] -- all of which were decided before the Court's June 21, 2019 Decision -- simply rely on *Sharp* and, in any event, cannot be used on this motion. *See, e.g., Auscape Int'l v. Nat'l Geographic Soc'y*, No. 02 Civ. 6441 (LAK), 2003 WL 22127011, at *2 (S.D.N.Y. Sept. 15, 2003) (any "legal authorities in support of his substantive arguments that were not cited in his initial submission . . . cannot appropriately be relied upon now.").

Having failed to show that this Court committed "an obvious and glaring mistake" by "overlooking" *Sharp*, Gerszberg has utterly failed to satisfy the strict and high burden imposed on a party moving for reconsideration of a previous decision. *M.K.B.*, 2006 WL 3230162, at *1. Simply put, Gerszberg's regurgitation of the identical argument that he made in his original motion, which this Court rejected, cannot serve as a basis for a reconsideration motion. *See Shrader*, 70 F.3d at 257; *Prout*, 319 F. Supp. 3d at 744.

III. RECONSIDERATION IS NOT WARRANTED BECAUSE *SHARP* IS NOT CONTROLLING

To state a claim for aiding and abetting a breach of fiduciary duty under New York law, a plaintiff must allege "(1) a breach by a fiduciary of obligations to another, (2) that the defendant

[5] These additional cases are readily distinguishable. *See* p. 15, n. 6, *infra*,

knowingly induced or participated in the breach, and (3) that [the] plaintiff suffered damage as a result of the breach." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2d Cir. 2006) (quoting *Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157, 169 (1st Dep't 2003)).

In *In re Platinum-Beechwood Litigation*, 2019 WL 1570808, *8 (S.D.N.Y. April 11, 2019), this Court described the elements of a claim for aiding and abetting a breach of fiduciary duty as follows:

> "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.*

Gerszberg's motion for reconsideration does not dispute that the Court properly held that the SAC alleged that Gerszberg had knowledge of the Platinum Defendants' breaches of fiduciary duty. Gerszberg's motion simply argues that the Court "overlooked" *Sharp's* holding on the issue of the "substantial assistance element" of the aiding and abetting claims. Specifically, Gerszberg asserts that this Court's holding that Gerszberg "substantially assisted" in the breaches of fiduciary duties "cannot be reconciled with the long-standing precedent that '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* Gerszberg Mem., pp. 5-6.

Gerszberg's facile argument must be rejected for two separate reasons: (1) the Court held that the SAC alleges that Gerszberg affirmatively assisted in the Platinum Defendants' breaches of fiduciary duty; and (2) Gerszberg's purposeful misreading and distortion of *Sharp.*

A. Gerszberg's Affirmative Acts Assisting The Platinum Defendants' Breaches Of Fiduciary Duty

First, the Court held that the SAC alleged that (a) Gerszberg had actual knowledge of the Platinum Defendants' breaches of fiduciary duties and (b) Gerszberg substantially assisted in the breaches of fiduciary duties, holding:

> The SAC plausibly alleges that *Gerszberg engaged in multiple transactions that stripped PPVA of its value, and that he did so with actual knowledge of PPVA's financial difficulties and the Platinum Defendants' fiduciary breaches.* SAC ¶¶ 744, 749. Given the nature the transactions with which Gerszberg is charged, the SAC's allegations of knowledge are far from conclusory. *Moreover, the SAC adequately alleges that Gerszberg substantially assisted in the breaches that led to his enrichment and that he proximately caused the injuries that PPVA suffered.* Indeed, it is hard to imagine how the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, or the Spectrum30 Loan would have happened without him. (Emphasis added).

In re Platinum-Beechwood Litigation, 2019 WL 2569653, at *14.

The Court correctly held that Gerszberg's actions "substantially assisted" in the Platinum Defendants breached of fiduciary duty. Indeed, Gerszberg's actions with respect to the Forbearance Agreement, by itself, shows that Gerszberg affirmatively assisted the Platinum Defendants' breaches of fiduciary duty. Armed with the knowledge on July 4, 2016 that PPVA's managers had settled on liquidation and chapter 15 bankruptcy as a means to resolve creditor claims, Gerszberg prepared and arranged for the execution of the Forbearance Agreement, dated July 5, 2016, under which DMRJ Group LLC ("DMRJ"), a subsidiary of PPVA, provided West Loop South LLC ("West Loop") and Epocs Real Estate Partnership, Ltd. ("Epocs") a limited, non-recourse guaranty of amounts (approximately $ 7.7 million) allegedly owed to Defendants by PPVA. However, West Loop and Epocs provided no consideration to PPVA or DMRJ for this guaranty and DMRJ's interest in a 2012 Note from Implant Sciences Corporation ("Implant Sciences") before PPVA imploded. In addition, the Forbearance Agreement was a part of an

ongoing fraudulent scheme engaged in by Gerszberg, Mark Nordlicht ("Nordlicht"), a co-founder of PPVA, and other Platinum executives.

It bears repeating that this Court held that "[t]hrough the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, and the Spectrum30 Loan, Gerszberg and his affiliates were allegedly awarded various financial benefits at the expense of PPVA" and that "[t]hese benefits were awarded without consideration and unambiguously "operated at [PPVA's] expense." *In re Platinum-Beechwood Litigation*, 2019 WL 2569653, at *14.

Thus, there can be no question that Gerszberg "affirmatively assisted" in the various breaches of fiduciary duty of the Platinum Defendants. Indeed, this Court specifically held that "Gerszberg substantially assisted in the breaches that led to his enrichment and that he proximately caused the injuries that PPVA suffered" and that "*it is hard to imagine how the Purported Underlying West Loop/Epocs Obligations, the Forbearance and Security Agreement, or the Spectrum30 Loan would have happened without him.*" *Id*. (Emphasis added).

In short, Gerszberg's actions, as alleged in the SAC and as this Court held, are the classic type of "substantial assistance" that constitutes an aiding and abetting claim of breach of fiduciary duty.

B. Gerszberg's Purposeful Misreading and Distortion Of Sharp

Second, Gerszberg's argument is based on a purposeful misreading and distortion of Sharp. In *Sharp*, the Defendant Bank State Street ("Bank") realized that the managers of Sharp Corporation ("Sharp") were engaging in fraud in connection with falsifying business records and misappropriation of loan funds. The Bank was a secured lender of Sharp and demanded that Sharp pay off its loan immediately. After a diligent investigation, the Bank knew that Sharp's managers had falsified its business records, and that Sharp would need to continue to misstate its financial

performance in order to obtain new financing to pay off the Bank. Based on fraudulent financial disclosures, Sharp obtained new financing and paid off the Bank. Sharp was placed into bankruptcy, and the trustee filed claims against the Bank for aiding and abetting breach of fiduciary duty of the Sharp managers and fraudulent transfer. The damages alleged by the *Sharp* trustee on the aiding and abetting count was the $19 million in misappropriation of loan funds that occurred after the refinancing and after the Bank failed to blow the whistle. The Second Circuit affirmed the decisions of the lower courts and dismissed the trustee's complaint in its entirety. On the aiding and abetting count, the Second Circuit held that the Bank did not provide "substantial assistance" by negotiating a refinancing and payoff of its loan to Sharp:

> No doubt, a request for repayment does exert some sort of pressure, and any pressure can be seen as an inducement, at least incrementally. But that is an unhelpfully broad reading of inducement in this context. *The demand at issue was for no more than was owed: repayment of Sharp's outstanding debt to State Street. State Street had a right to foreclose (as the complaint alleges); yet State Street evidently did not expect foreclosure to be efficacious. Under the circumstances, the demand for repayment of a bona fide debt is not a corrupt inducement that would create aider and abettor liability.* (Emphasis added).

Sharp, 403 F.3d at 51. Moreover, the Second Circuit held that State Street's execution of a contractually required letter consenting to the refinancing did not constitute "substantial assistance," stating *(id.* at 52-53):

> State Street's consent was not an inducement; it merely removed an impediment. Nor did the consent conceal the fraud. *Kaufman,* 307 A.D.2d at 126, 760 N.Y.S.2d 157. The remaining question is whether that consent constituted "affirmative assistance."
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> * * *
>
> On the other hand, State Street's consent was mere forbearance; it did no more than remove a contractual impediment that was reserved to State Street to invoke or not in its own interest. The existence of that right did not entail a duty to consider the interests of anyone else, and *State Street's exercise of that right to protect*

> *itself rather than its improvident competitors did not constitute participation in the Spitzes' fraud.*
>
> * * *
>
> Whatever Loucks and State Street knew about the Spitzes' fraud, they had come by that information through diligent inquiries that any other lender could have made. Sharp fails to identify any duty on State Street's part to precipitate its own loss in order to protect lenders that were less diligent. All the allegations are in substance the same: *that State Street was in a position to blow the whistle on the Spitzes' fraud, but did not; instead, State Street arranged to extricate itself from the risk.* (Emphasis added).

Thus, *Sharp* stands for the proposition that a secured creditor enforcing its contractual rights against a borrower and taking no "affirmative acts" beyond such contractual rights cannot be "substantial assistance" for purposes of an aiding and abetting breach of fiduciary duty claim.

However, a third party can be liable for aiding and abetting a breach of fiduciary duty when such third party takes actions that go beyond the exercise of their contractual rights. This precise question was recently considered in *Ramiro Aviles v. S&P Global, Inc.*, 380 F.Supp.3d 221, 307 (S.D.N.Y. 2019), where, in denying the Wells Fargo defendants' motion to dismiss the aiding and abetting breach of fiduciary duty claim, the District Court held:

> As for substantial assistance, the Wells Fargo Defendants argue only that their exercise of a contractual foreclosure right cannot, as a matter of law, constitute substantial assistance of a fiduciary breach. (Dkt. No. 89 at 36.) To be sure, the "mere demand for the repayment of a bona fide debt does not constitute a corrupt inducement to establish aiding and abetting liability." *Barnet v. Drawbridge Special Opportunities Fund LP*, No. 14 Civ. 1376, 2014 WL 4393320, at *18 (S.D.N.Y. Sept. 5, 2014). But, again, *the Wells Fargo Defendants are alleged to have done more than make a demand for repayment. According to the complaint—which the Court must for present purposes take to be true—had the Wells Fargo Defendants simply wanted to collect what they were owed, they could have invoked the foreclosure procedures in the preexisting Loan Agreement. Instead, though, they are alleged to have exploited Smith and Marcum's personal concerns in order to wring yet more out of Lifetrade.* (Emphasis added).

The identical result was reached in *Barnet v. Drawbridge Special Opportunities Fund LP*, No. 14-cv-1376 (PKC), 2014 WL 4393320 (S.D.N.Y. Sept. 5, 2014). There, the defendants conceded that the liquidators had alleged the existence of a breach of a fiduciary obligation and that damages from such breach, but disputed that the liquidators had alleged that defendants knowingly induced or participated in the breach of fiduciary duty. Relying on *Sharp*, the defendants asserted that their actions "simply facilitated the repayment of a valid debt to the Australian Fortress Entities" and that such actions "do not establish the knowing inducement element." *Barnet*, 2014 WL 439322̶0, at *18.

The District Court rejected defendants' purported reliance on *Sharp*, which held that "a mere demand for repayment of a bona fide debt does not constitute a corrupt inducement to establish aiding and abetting liability." *Id.* The District Court denied defendants' motion to dismiss the aiding and abetting breach of fiduciary claims on the grounds that the "defendants are alleged to have done far more than a mere demand for the repayment of an outstanding debt" and that such actions beyond the exercise of a contractual right constitutes the "substantial assistance" requirement. *Id.* at 19.

Suffice it to say, Gerszberg was not a secured creditor of PPVA. The actions alleged in the SAC, which this Court held sufficiently allege an aiding and abetting breach of fiduciary duty claim, have nothing to do with the enforcement of Gersberg's rights as a secured creditor under a lending agreement or otherwise. As the Court held, Gerszberg's actions with respect to the Forbearance Agreement, the Spectrum30 Loan, and other actions that comprise the Second Scheme, were affirmative actions that Gerszberg took that provided substantial assistance to the Platinum Defendants' breaches of their fiduciary duties to the Platinum Funds. Simply put, Gerszberg's actions were not the "mere demand for repayment of a legitimate debt," the "removal

of an impediment" pursuant to a contractually required consent or the exercise of contractual rights as in *Sharp*.[6]

IV. RECONSIDERATION IS NOT WARRANTED ON THE BALANCE OF PLAINTIFFS' UNJUST ENRICHMENT CLAIM

Although Gerszberg's motion seeks to have this Court reconsider the Decision denying Gerszberg's motion to dismiss in its entirety, his motion does not even attempt to show how this Court "overlooked" any controlling decision in sustaining Plaintiffs' unjust enrichment claims against Gerszberg except to the extent that it relates to the Spectrum30 Loan.[7]

[6] The remaining cases cited by Gerszberg (*see* Gerszberg Mem., pp. 4, 6) are readily distinguishable because the plaintiff failed to allege the key elements of the claim. For example, in *Hongying Zhao v. JPMorgan Chase & Co*., 17 Civ. 8570 (NRB), 2019 WL 1173010, *5-8 (S.D.N.Y. Mar. 13, 2019), the aiding and abetting breach of fiduciary duty claim was dismissed because plaintiff failed to allege (1) a fiduciary relationship, (2) that defendants had actual knowledge of the breach of the alleged fiduciary relationship and (3) that defendants substantially assisted in the breach of the fiduciary duty. Similarly in *In re Sabine Oil & Gas Corp*., 547 B.R. 503, 563-564 (Bankr. ~~Ct.~~ S.D.N.Y. 2016), the claim was dismissed for failure to allege "a breach of fiduciary obligations" and "defendant's actual knowledge of a breach of the fiduciary duty by some other party." The claim was dismissed in *SPV OSUS Ltd. v. AIA LLC,* 15-cv-619 (JSR), 2016 WL 3039192,*6-8 (S.D.N.Y. May 26, 2016) on the ground that "but-for causation" is insufficient and failure to allege defendants' "substantial assistance" in the primary violator's breach of fiduciary duty.

In sharp contrast to those cases, this Court held that Plaintiffs had alleged all of the elements of the aiding and abetting breach of fiduciary duty claim against Gerszberg.

[7] We note that *Sharp* has no relevance to Plaintiffs' unjust enrichment claim against Gerszberg.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court deny in its entirety the motion for reconsideration filed by Defendant Seth Gerszberg.

Dated: New York, New York
July 26, 2019

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