UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUSINESS EXPOSURE REDUCTION GROUP (BERG) ASSOCIATES, LLC Plaintiff, v. PERSHING SQUARE CAPITAL MANAGEMENT, L.P. Defendant.	CIVIL ACTION NO.: 1:20-CV-10053-PAE **AMENDED COMPLAINT**

PARTIES

1. Plaintiff, Business Exposure Reduction Group Associates, LLC (hereinafter "BERG") is a Florida limited liability company, which has a usual place of business at 9903 Old Hyde Park Place, Bradenton, FL 34202.

2. Defendant, Pershing Square Capital Management, L.P. (hereinafter "Pershing") is, upon information and belief, a Delaware limited partnership with a usual place of business at 888 Seventh Avenue, 42nd Floor, New York, NY 10019.

JURISDICTION AND VENUE

3. This court has diversity jurisdiction over this matter pursuant to 28 U.S.C. §1332.

4. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c) as, upon information and belief, a result of: (i) Defendant having a principal office located with the District, (ii) a substantial part of the events or omissions giving rise to the claim having occurred in the District, and (iii) Defendant having capacity to be sued in its common name under applicable law and being subject to the Court's personal jurisdiction with respect to the civil action in question.

5. Venue and personal jurisdiction over the Defendant is aappropriate in the District because the Defendant has registered as a foreign limited partnership with the New York State Secretary of State and, upon information and belief, maintains either a principal office or office at which a substantial amount of services are provided within the physical jurisdiction of the District.

STATEMENT OF FACTS

6. Upon information and belief, at all times mentioned, Pershing was and still is an investment firm, in the business of managing the investments of certain investment funds and in the business of investing in securities.

7. At all times mentioned, BERG was and still is engaged in providing consulting, forensic accounting, and related investigative work on behalf of third-parties.

8. Mr. Larry Johnson is not an attorney and is a member of BERG.

9. Mr. John Moynihan is not an attorney and was a member of BERG until 2017.

10. Prior to December 2, 2013, Pershing contacted BERG to consider and explore engaging BERG to provide its investigative skills and services.

11. Pershing specifically desired to engage BERG to investigate the conduct and business activities of Herbalife, Ltd. (hereinafter "Herbalife") and its distribution network for Pershing's use in managing its investment funds and in evaluating and making investment decisions in Herbalife.

12. On December 2, 2013, BERG presented Pershing with its fee agreement ("Fee Agreement Draft 1").

13. Upon information and belief, Pershing, upon the advice of counsel, requested modifications to the fee agreement.

14. A second draft of the fee agreement was produced on or about December 17, 2013 ("Fee Agreement Draft 2").

15. A third and the final draft of the fee agreement was produced and signed by the parties on December 23, 2013 (the "Fee Agreement").

16. At no time during the negotiation of the Fee Agreement was BERG represented by counsel.

17. Per the terms of the Fee Agreement, Pershing engaged BERG to provide assistance to Pershing for itself and on behalf of certain investment funds that Pershing managed.

18. Per the terms of the Fee Agreement, Pershing engaged BERG to "provide assistance regarding [Pershing's] concerns about the business of Herbalife, Ltd. and its distribution network [HLF]."

19. The assistance that Pershing engaged BERG to perform included developing an investigative case against Herbalife and presenting that case to Pershing, including ascertaining objective facts about Herbalife, its product, and its operations, to potentially be used by Pershing in connection with its investment strategy and positions on Herbalife stock, including, upon information and belief, a short position taken in May 2012.

20. Additionally, per the terms of the Fee Agreement, BERG was to conduct its investigation and coordinate with Pershing to formulate a strategy and goals for the engagement.

21. Upon information and belief, any information that BERG was able to uncover, which Pershing would choose to use to influence the investment strategy and positions held or taken by Pershing or its managed funds would be beneficial to Pershing.

22. Pursuant to the Fee Agreement, Pershing agreed to pay for BERG's services on an hourly rate basis, plus expenses. The agreed rate was $200 per man hour worked.

23. The Fee Agreement contained a term to provide for an increase in the hourly fee paid to BERG based upon the outcome or results of the investigative case developed by BERG. The Fee Agreement stated as follows: "In the event the case developed by BERG Associates is settled or resolved in a manner that [Pershing] determines is beneficial to the financial standing of [Pershing], the hours billed previously by BERG will be paid at a rate of $750 per hour."

24. The fee increase equaled an additional $550 per hour ("Hourly Fee Increase") over the base rate to be paid under the Fee Agreement.

25. Upon information and belief, at the time of Pershing engaging BERG, Herbalife stock was trading at $80.81 (unadjusted price) at close on December 23, 2013.

26. Following engagement, BERG began developing its investigative case immediately. Its investigations into various aspects of Herbalife were quite revealing, and Pershing used the information that BERG uncovered as is laid out in more detail below.

27. BERG found tax and fraud issues with respect to the operation of Herbalife.

28. Most notably, BERG uncovered that the distribution of Herbalife was closely tied to drug trafficking channels and that known drug traffickers were deeply involved in the company.

29. BERG also provided investigative support for the position that Herbalife was targeting low-income Latin Americans as distributors and exploiting them.

30. Pershing believed that the investigative case being developed by BERG was beneficial and, on July 22, 2014, the public presentation of "The Big Lie" was made by Pershing and its principal, Mr. William Ackman, using materials obtained from BERG as a result of BERG's investigation.

31. Pershing also revealed the information from BERG's investigative case to the press.

32. The following were some of the ways that the information from BERG's investigative case was incorporated into Pershing's presentation:

- BERG's undercover investigation into the NYC metro nutrition clubs provided corroborating evidence for the claim that Herbalife was targeting vulnerable groups, which included video recordings from more than 100 clubs;
- BERG's evidence provided concrete support for the claim that Herbalife was targeting the Latin American and low-income populations;
- In meetings in June 2014, BERG had raised with Pershing the concept that Nutrition Clubs far outnumbered fast food establishments in Mexico. BERG recommended using this comparison of the market saturation of Nutrition Clubs to McDonald's Restaurants and provided the data to ITHREAT, which produced a graphic depiction for Pershing's presentation;
- BERG's source in Mexico provided inside stories from traffickers regarding Herbalife executive Eduardo Salazar's ties to organized crime;
- Subsequent investigation by BERG in Russia established Herbalife international distributor Leon Waisbein's links to Russian organized crime;
- BERG subsequently developed critical information linking Herbalife executive Pedro Cardoso to a money laundering case in Brazil.

33. BERG's investigation was unquestionably beneficial to Pershing and its financial standing. As word spread of the investigation, Herbalife investors got nervous.

34. As a result the investors' nervousness, Herbalife stock plummeted, from $80.81 per share, when BERG was engaged in December 2013, to $33.25 (unadjusted price) per share when BERG was asked to "stand down," or cease developing its investigative case, on March 12, 2015.

35. At that time, Mr. John Moynihan and Mr. Larry Johnson of BERG strongly suggested that the short position be closed, which, upon information and belief, would have resulted in unquestionable monetary value and financial benefit to Pershing of $107,010,000.00 ($80.81 - $33.25 = $47.56 price per share, multiplied by the shares of stock Pershing held, 2,250,000).

36. Upon information and belief, if Pershing had acted on the recommendation of BERG as Pershing's direction to cease developing its investigative case, Pershing would have realized a financial benefit with respect to its short positions.

37. Pershing, however, made an imprudent investment decision and chose not to close its stock position at a time when doing so would have been most financially beneficial to it and, instead, asked BERG to stop its work, thereby frustrating the ability of BERG to collect its Hourly Fee Increase at that time.

38. In failing to follow the recommendations of BERG and in advising BERG to cease its work, Pershing breached its obligation to formulate a final strategy and goal for the engagement.

39. Upon BERG's cessation of further developing the investigative case for Pershing, Herbalife stock almost immediately began to recover, which was a strong indicator of the effectiveness of BERG's work.

40. The following further evidences the success that BERG had on Pershing's behalf and the benefit BERG provided:

- The Herbalife stock drastically decreased in price during the period that BERG performed its investigation and revealed its findings to be used by Pershing;

- Pershing paid BERG's invoices for services in full throughout the engagement. Pershing never indicated any problems with or objections to the services that BERG provided;
- Pershing asked BERG to stand-down in March 2015 but indicated that it still wanted BERG available to consult if needed. As a result of BERG's investigation as presented in "The Big Lie", Herbalife was the subject of a Federal Trade Commission (FTC) investigation and Pershing asked BERG to continue to respond to regulators with information;
- Pershing made full use of the information provided by BERG ;
- Pershing took the BERG-developed information about Herbalife to the United States Drug Enforcement Administration (DEA), New York Field Division, in an effort to prosecute those responsible for the money laundering scheme that was at the heart of the Herbalife empire;
- Pershing took BERG discovered information to the FTC, which ultimately resulted in a settlement in or around July 2016 whereby Herbalife paid defrauded investors.

41. The parties agreed that the success of the engagement would be determined by the effect on the financial standing of Pershing, which in the context of the engagement would be presumably judged by the effect on the existing stock positions held by the funds managed by Pershing, by Pershing's ability to hedge any potential losses on the May 2012 short position or any other short position taken, by the investment decisions of Pershing based upon the investigative work during the engagement, and by any management fees or bonuses earned by Pershing for its management activities.

42. Even though Pershing attempted to frustrate BERG's ability to collect the Hourly Fee Increase by telling them to "stand down," BERG brought value to Pershing by providing it with the information developed in the investigative case.

43. Pershing failed to recognize a profit on its short position as a direct result of an investment decision by Pershing not because BERG failed to produce valuable information to Pershing.

44. Even though Pershing's investment decision resulted in significant losses, absent the information in BERG's investigative case, Pershing's loss likely would have been more substantial.

45. BERG was hired to investigate the company Herbalife and present its investigative case to in-house legal counsel at Pershing, which it clearly did.

46. There is no dispute that BERG's investigation caused the stock price of Herbalife to plummet.

47. There is no dispute that Pershing told BERG to "stand down" at a point where Pershing would have realized significant gain had they exercised their short position.

48. There is no dispute that Pershing made an investment decision that created a significant loss for Pershing.

49. There is no dispute that Pershing used BERG's information.

50. As a result, BERG is owed its hourly fee increase under the Fee Agreement. Total hours billed were 5,612.5. At an additional rate of $550.00 per hour, this results in an amount due to BERG of $3,086,875.00.

51. BERG's position was asserted in a demand letter dated March 24, 2015 to Pershing.

52. Pershing representatives had a meeting with BERG and its then-counsel in New York on May 6, 2015.

53. At that meeting, Mr. William Ackman expressed surprise that BERG had been asked to stand down, apparently not having been so informed. He also did not deny the assertions that BERG made in its demand for payment.

54. At that meeting, Mr. William Ackman asked that BERG wait until he closed his position and then he would re-visit BERG's entitlement to additional compensation.

55. Pershing closed its stock position in Herbalife in or around July 2018.

56. BERG renewed its demand for payment from Pershing by its counsel's letter dated July 24, 2019.

COUNT I
BREACH OF CONTRACT

57. Plaintiff repeats and incorporates herein by reference the allegations contained in paragraphs 1 through 56 of the Complaint.

58. BERG and Pershing entered into a contractual agreement by executing the Fee Agreement.

59. BERG fully performed its obligations under the Fee Agreement until such time as Pershing requested BERG cease performing investigative services under the Fee Agreement.

60. In performing investigative services, BERG provided a valuable service to Pershing that was beneficial to the financial standing of Pershing during the term of the engagement.

61. Despite having received services from BERG that were beneficial to the financial standing of Pershing, Pershing has failed and refused to make payment of the Hourly Fee Increase due to BERG.

62. In failing to make payment of the Hourly Fee Increase due BERG, Pershing has breached the terms of the agreement between the parties.

63. As a direct and proximate result of Pershing's breach, BERG has suffered damages in the sum of $550 per hour for 5,612.5 hours worked, totaling $3,086,975.00, plus interest from the date of the breach, and the costs and disbursements of this action.

COUNT II
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

64. Plaintiff repeats and incorporates herein by reference the allegations contained in paragraphs 1 through 63 of the Complaint.

65. Pershing's conduct in refusing to follow the recommendation to close its positions was arbitrary or unreasonable, and acted to prevent BERG from enjoying the benefit of the Hourly Fee Increase.

66. By its conduct, Pershing has breached the covenant of good faith and fair dealing implied in the parties' contract.

67. As a direct and proximate result, BERG has suffered damages in the sum of $550 per hour for 5,612.5 hours worked, totaling $3,086,975.00, plus interest from the date of the breach, and the costs and disbursements of this action.

WHEREFORE, Plaintiff, Business Exposure Reduction Group (BERG) Associates, LLC, requests that this Court grant the following relief:

A. Enter judgment in its favor against Defendant, Pershing Square Capital Management, L.P., for damages in an amount to be determined at trial, plus interest and costs;

B. Award Plaintiff its costs and legal interest; and

C. Grant such other and further relief that this Court deems just and equitable.

Respectfully submitted,

BUSINESS EXPOSURE REDUCTION GROUP (BERG) ASSOCIATES, LLC

By their attorneys,

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