UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUSINESS EXPOSURE REDUCTION GROUP ASSOCIATES, LLC, Plaintiff, v. PERSHING SQUARE CAPITAL MANAGEMENT, L.P., Defendant.	)	Civil Action No.: 20-cv-10053-PAE

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendant Pershing Square Capital Management, L.P. ("PSCM") respectfully moves to dismiss with prejudice the Amended Complaint of Plaintiff Business Exposure Reduction Group Associates, LLC ("BERG") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted.

PRELIMINARY STATEMENT

By this lawsuit, an investigative firm that was paid over $1,100,000 to develop information to assist an investor with a specific investment seeks a success fee of three times that amount, even though it acknowledges that the investor suffered a "significant loss". The governing contract gave the investor sole discretion to determine whether a success fee was warranted, and the investor declined to grant one. Because the lawsuit's claims cannot be squared with the unambiguous terms of the parties' contract, this action should be dismissed.

Pursuant to an agreement executed by BERG and PSCM in December 2013 ("Agreement"), BERG undertook an investigation of Herbalife, Ltd. ("Herbalife" or "HLF"), a company in which investor PSCM had taken a short position. The Agreement required PSCM to pay BERG on an hourly basis. BERG acknowledges that PSCM did so, paying invoices in full during the engagement. But BERG contends that it should also be awarded an additional $3,000,000-plus pursuant to a success fee provision in the Agreement. The problem for BERG is that its demand runs afoul of the plain language of that provision.

The Agreement provides that BERG is entitled to a premium payment only "[i]n the event the case developed by BERG Associates is settled or resolved in a manner that PS[CM] determines is beneficial to the financial standing of PS[CM]." By no measure was the Herbalife matter beneficial to PSCM's financial standing because, as BERG concedes, PSCM *lost* an immense amount of money on its short position – as publicly reported, at least hundreds of millions of dollars. BERG tries to skirt this fatal flaw by pointing instead to unrealized gains that

PSCM supposedly "would have" obtained had it liquidated its Herbalife position at a time that BERG says it preferred. But nothing in the Agreement asked for BERG's investment advice, a field in which it claims no qualifications. Nor did the Agreement, drafted by BERG, vest BERG with an option to require assessment of its contribution to some preferred point before the short was liquidated. Indeed, the Agreement quite sensibly provided that the assessment of whether a success fee was warranted would be made when the case was "settled or resolved". And even if the Agreement could somehow be construed as permitting BERG to demand a success fee before PSCM settled its Herbalife position (which it did not), the Agreement afforded PSCM sole discretion to determine whether BERG's work had been beneficial to PSCM's financial standing. The law is clear that a party with such discretion will not have its decision disturbed so long as its choice was not arbitrary or irrational – and the Amended Complaint is devoid of *any* factual allegation speaking to that decision. To the contrary, in a pleading where BERG attempts to tie the effectiveness of its work to decreases in Herbalife's stock price, it is notable that in the single instance in which BERG alleges its work was revealed to the public, Herbalife's stock price *rose* by 25%.

Under the circumstances, PSCM's view that no success fee was warranted is manifestly rational. BERG has received all the benefits it bargained for in the Agreement, over $1,100,000 of fees, and is entitled to nothing more. The Court should dismiss the Amended Complaint with prejudice.

ALLEGATIONS[1]

PSCM, an investment firm, took a short position in Herbalife in May 2012. ¶¶2, 6, 19. Approximately a year and a half later, PSCM engaged BERG to investigate Herbalife in support of PSCM's investment strategy. ¶11. On December 23, 2013, after some back and forth on terms relating to scope of the assignment, confidentiality and expenses (but not fees), the parties executed the Agreement. ¶¶12-15; Exs. A, B & C.[2]

The parties agreed that BERG would investigate Herbalife's business and distribution network in exchange for a set hourly fee. ¶¶18, 22, 24; Ex. C. Specifically, PSCM agreed to pay, and BERG agreed to accept, an hourly rate of "two hundred dollars ($200) per man hour worked," plus expenses. ¶22; Ex. C, at 2. The Agreement says nothing about BERG,

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[1] These allegations are drawn from the Amended Complaint, which are accepted as true solely for the purposes of this motion; the Agreement and certain drafts of that agreement referenced in the Complaint; and publicly available information regarding Herbalife, including its stock price. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) ("In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint."); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 n.8 (2d Cir. 2000) (taking judicial notice on motion to dismiss of publicly available stock prices not explicitly alleged in complaint); *Acticon AG v. China N.E. Petroleum Holdings Ltd.*, 692 F.3d 34, 37 n.1 (2d Cir. 2012) (same).

References to "¶ _" are to the Amended Complaint. References to "Exhibit __" or "Ex.__" are to exhibits attached to the accompanying Declaration of John P. Coffey ("Coffey Declaration").

[2] The Amended Complaint alleges that there were three iterations of the Agreement: a December 2, 2013 draft sent by BERG to PSCM (defined in the Amended Complaint as "Fee Agreement Draft 1" (¶12)); a second draft "produced on or about" December 17, 2013 (defined as "Fee Agreement Draft 2" (¶14)), and the third and final version, the signed "Fee Agreement" (¶15). BERG did not attach any of these documents to its pleading. The three documents are attached to the Coffey Declaration as Exs. A (with its factually accurate date of December 17, 2013), B (PSCM's mark-up of BERG's December 17, 2013 draft (*see* ¶13)), and C (the signed Agreement).

an investigative firm, offering investment advice to PSCM. Nor does the Agreement impose any obligation by PSCM to follow any investment advice that BERG might offer.

The Agreement provided for a potential success fee should PSCM's investment strategy in Herbalife prove to be successful. The parties agreed that:

> In the event the case developed by BERG Associates is settled or resolved in a manner that PS[CM] determines is beneficial to the financial standing of PS[CM], the hours billed previously by BERG will be paid at a rate of $750 per hour. The decision regarding the "beneficial status" will be made by PS[CM] based on its evaluation of the work product delivered by BERG Associates.

Ex. C, at 3; ¶22. Any potential success fee was thus tied to whether PSCM determined that BERG's investigation was "settled or resolved" to PSCM's benefit, taking into account PSCM's evaluation of BERG's work product. The parties explicitly agreed that the decision regarding PSCM's beneficial status rested solely with PSCM. The parties also agreed that PSCM's assessment of financial benefit would be made once the case was over, that is, when it was "settled or resolved". This success fee term contains no provision for assessing PSCM's hypothetical paper gain or loss at some interim point prior to PSCM closing out its Herbalife position. The Agreement contained no obligation by PSCM to liquidate its Herbalife position at a time preferred by BERG.

The text of the Agreement's success fee provision was drafted by BERG, which included it in the original draft it sent to PSCM; PSCM did not modify that provision. *Compare* Ex. A *with* Ex. B.

After being retained, BERG developed troubling facts about Herbalife's business practices. ¶¶26-29, 32. Using, in part, materials obtained from BERG's investigation, PSCM principal William Ackman made a public presentation called "The Big Lie" in July 2014. ¶¶30-31; *see also* ¶32 (listing information developed by BERG used in that presentation).

The Amended Complaint makes reference to the reaction of the market to public disclosure of BERG's investigation. *See* ¶33 (investors "got nervous" as word of BERG's investigation spread); ¶34 (linking investor "nervousness" about BERG's investigation to movement in Herbalife's stock price). However, the Amended Complaint describes only one instance in which any information developed by BERG was disclosed to the market – during "The Big Lie" presentation on July 22, 2014 (¶¶30-32) – and the market reaction was decidedly *negative* for PSCM's short position in Herbalife. Herbalife's stock price *rose 25%* that day, falling rapidly during PSCM's presentation, and continuing its rise as the market evaluated that information throughout the trading day. Ex. D, at 1; *see also* Ex. E (Nathan Vardi, *Bill Ackman's Big Herbalife Reveal Bombs With Investors*, Forbes.com (July 22, 2014) (noting, at 3, that PSCM's presentation "detail[ed] the findings of a seemingly large investigation")).[3]

According to Plaintiff, PSCM asked BERG to "stand down" on March 12, 2015. ¶34. BERG alleges that its principals urged PSCM to close its short position at that time (¶35), that PSCM "would have realized a financial benefit with respect to its short positions" if it had done so (¶36), but that PSCM "made an imprudent investment decision" not to follow their advice "at a time when doing so would have been most financially beneficial" (¶37). From this, BERG contends that the assessment of PSCM's financial benefit should have been made – and a success fee paid – based on the hypothetical gain that PSCM supposedly "*would have*" received if it had settled its short position in March 2015. ¶37. To the extent the Amended Complaint suggests that, for purposes of the success fee determination, the case was "settled or resolved"

[3] The HLF prices listed in Ex. A reflect, retroactively, a two-for-one stock split that took effect in May 2018. The article at Ex. E, published on July 22, 2014, refers to the unadjusted pre-split prices as of that date. Thus, the closing HLF price of $67.77 described in the article (Ex. E, at 2) is thus twice the closing price of $33.88 listed in Ex. A.

when BERG supposedly stopped work in March 2015 (*see* ¶¶37, 39), BERG acknowledges elsewhere that its engagement continued well past March 2015. ¶40 (third bullet). For example, BERG notes that, at PSCM's request, it continued to respond to regulators such as the Federal Trade Commission ("FTC"), whose investigation continued into the summer of 2016. ¶40 (last bullet). Consistent with the Agreement, at a May 2015 meeting with BERG, PSCM's Ackman advised that PSCM would determine whether BERG was entitled to a success fee after PSCM closed its Herbalife position. ¶¶52, 54.

PSCM finally closed out its position in Herbalife in July 2018. ¶55. BERG acknowledges that PSCM suffered a "significant loss" when it did so. ¶48; *see also* Ex. F (Paul R. La Monica, *Bill Ackman's Herbalife disaster is finally over,* CNN Business (Mar. 1, 2018), https://money.cnn.com/2018/03/01/investing/herbalife-bill-ackman-carl-icahn/index.html).[4]

Between BERG's retention and the close of PSCM's Herbalife position, PSCM paid BERG over $1.12 million in fees. *See* ¶63 (5,612.5 hours); Ex. C, at 3 ($200/hour). BERG acknowledges that PSCM paid all of its invoices in full throughout the engagement. ¶40 (second bullet). Notwithstanding PSCM's significant loss and the discretion afforded to PSCM in the Agreement in determining whether it had benefitted financially, BERG contends that PSCM

[4] *See also* Ronald Orol, *It's Over: Icahn Beats Ackman in Battle Over Herbalife*, TheStreet (Feb. 28, 2018), https://www.thestreet.com/story/14505289/1/it-s-over-icahn-beats-ackman-in-battle-over-herbalife.html (estimating PSCM's losses in the hundreds of millions); David Benoit, *Bill Ackman Surrenders in His Five-Year War Against Herbalife*, The Wall Street Journal (Mar. 1, 2018), https://www.wsj.com/articles/bill-ackman-surrenders-his-in-five-year-war-against-herbalife-1519854456; Matthew Goldstein, *Ackman Ends His 5-Year Fight with Herbalife*, New York Times (Feb. 28, 2018), https://www.nytimes.com/2018/02/28/business/dealbook/ackman-herbalife-pershing-square.html; Lucinda Shen, *Ackman Calls It Quits on Herbalife as Pershing Square Restructures*, Fortune (Feb. 28, 2018), https://fortune.com/2018/02/28/bill-ackman-valeant-herbalife-short/.

breached both the Agreement and the implied duty of good faith and fair dealing because PSCM determined not to pay BERG a success fee of $3,086,975.

PROCEDURAL HISTORY

BERG filed its first complaint in this action in the District of Massachusetts on December 10, 2019. Dkt. No. 1. On December 1, 2020, this case was transferred to this District because the District of Massachusetts concluded that it did not have personal jurisdiction over PSCM. This Court held a case management conference on December 18, 2020, during which it granted BERG leave to file an amended complaint. After its colloquy with counsel, the Court also ruled that "[n]o further opportunities to amend will ordinarily be granted." Dkt. No. 48. BERG filed its Amended Complaint on December 31, 2020. Dkt No. 52.

ARGUMENT

Under Rule 12(b)(6), a court may dismiss these causes of action if they fail to state a claim upon which relief can be granted. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). Yet the court need not accept "naked assertions devoid of further factual enhancement." *Id.* (internal quotation marks and citation omitted).

Based on applicable law and the plain terms of the Agreement, BERG has failed to advance a claim upon which relief may be granted.

I. BERG's Claim For Breach Of Contract Fails As A Matter Of Law

To state a claim for breach of contract, a plaintiff must allege "(i) the formation of a contract between the parties; (ii) performance by the plaintiff; (iii) failure of defendant to perform; and (iv) damages." *Johnson v. Nextel Commc'ns, Inc.*, 660 F.3d 131, 142 (2d Cir.

2011).[5] "A breach of contract is 'the unexcused failure' to 'carry[] out the contract by doing what it requires or permits.'" *NASDAQ, Inc. v. ETF Managers Grp.*, 431 F. Supp. 3d 176, 240 (PAE) (S.D.N.Y. 2019) ("*ETFMG*") (alterations in original) (quoting *D & N Boening, Inc. v. Kirsch Beverages, Inc.,* 63 N.Y.2d 449, 456 (1984)). When a party's obligation is subject to a condition precedent, there is no breach unless and until that condition has been satisfied. *See Deutsche Bank AG v. AMBAC Credit Prods., LLC*, 2006 WL 1867497, at *9 (S.D.N.Y. Jul. 6, 2006) ("if the conditions precedent to a defendant's duty to perform have not been met, breach is not possible") (citing *Aetna Cas. and Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, 597 (2d Cir. 2005)). Courts look to the text of a contract and strictly apply its unambiguous terms. *See ETFMG,* 431 F. Supp. 3d at 227 (contract should be enforced according to its terms) (citing *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007), and *Kasowitz, Benson, Torres & Friedman, LLP v. Duane Reade*, 950 N.Y.S.2d 8, 11 (1st Dept. 2012)); *see also Orchard Hill Master Fund Ltd. v. SBA Commc'ns Corp.*, 830 F.3d 152, 156 (2d Cir. 2016) (district court may dismiss breach of contract claim if terms of contract are unambiguous).

BERG's contract claim fails because PSCM fully performed under the unambiguous terms of the Agreement.

Pursuant to the Agreement, PSCM was obliged to pay BERG $200 for every hour worked, plus expenses. PSCM did so, in full, paying BERG over $1.12 million in fees over the course of the engagement. Nonetheless, BERG insists that it is entitled to significantly more,

[5] PSCM respectfully submits that New York law applies here, but breach of contract claims under the law of Florida (where BERG was headquartered at the time the Agreement was signed) require essentially the same elements. Under Florida law, "[t]he elements of a breach of contract action are (1) a valid contract; (2) a material breach; and (3) damages." *Beck v. Lazard Freres & Co., LLC*, 175 F.3d 913, 914 (11th Cir. 1999) (citing *Abruzzo v. Haller,* 603 So. 2d 1338, 1340 (Fla. 1st DCA 1992).

namely, a success fee of over $3,000,000 that, according to BERG, should have been awarded pursuant to the success-fee provision in the Agreement. But in demanding this additional fee, BERG misconstrues two important components of the Agreement's success-fee provision.

First, the determination of whether BERG's work benefitted PSCM financially was to be made at a time certain, that is, when the case was "settled or resolved" and any financial benefit (or loss) was realized – not, as BERG prefers, at some midpoints chosen for the hypothetical gain it might maximize in hindsight. Properly assessed when PSCM closed its short position in July 2018, there was no financial benefit triggering a potential success fee because PSCM had in fact suffered a massive loss. Thus, the condition precedent for any obligation even to consider a bonus was never met.

Second, even assuming an obligation to consider a bonus had arisen, the Agreement vested PSCM with sole discretion to determine whether BERG's work had benefitted PSCM's financial standing. This is a critical point given that the Amended Complaint contains *no* factual allegation whatsoever that PSCM's exercise of discretion not to award a bonus was arbitrary or unreasonable. To the contrary, the most BERG can muster is tepid criticism of a different PSCM decision, namely, its decision not to liquidate its position in March 2015, and even there the worst it can say is that PSCM's investment decision was "imprudent". ¶37.

These points are addressed more fully below.[6]

[6] For purposes of this motion only, PSCM will not press its view that the reference to "case" in the success-fee provision alluded specifically to a litigation developed as a result of BERG's work. While the "settled or resolved" language that follows "case" is consistent with PSCM's view that the parties intended "case" to refer to its usual meaning – a lawsuit – we will assume for purposes of this motion BERG's broader interpretation of "case" as meaning the Herbalife matter writ large.

A. The Condition Precedent for the Success Fee Was Not Met Because PSCM Had Not Financially Benefitted from BERG's Work as of the Date the Matter Was Settled or Resolved

BERG's breach of contract claim fails because a condition precedent to any success fee – "in the event" that PSCM had obtained a financial benefit when the Herbalife matter was settled or resolved (Ex. C, at 3) – never occurred.

As BERG acknowledges, "the parties agreed that the success of the [BERG] engagement would be determined by the effect on the financial standing of Pershing…." ¶41. But BERG glides by the fact that there is a temporal component to the success-fee determination, namely, that the financial impact of BERG's work was to be measured at the time the case was "settled or resolved." The resolution occurred in July 2018, when PSCM ultimately closed its Herbalife position. As of that date, the end of its Herbalife venture, PSCM had suffered a massive loss. There was no "financial benefit" to PSCM attributable to BERG or anyone else. There was no success here, but rather an ugly rout.

BERG nevertheless claims that PSCM's financial benefit should be measured by the decline in Herbalife's stock price as of a date over two years earlier, when BERG purportedly urged PSCM to liquidate its position after BERG was allegedly advised to "stand down." ¶47. But this theory cannot be squared with the unambiguous "settled or resolved" language in the Agreement. By its natural meaning, "settled or resolved" means an endpoint, a terminus, a conclusion, or, in this context, an end to that investment. Nothing in the Agreement comes close to suggesting that BERG could "declare" its preferred date for the bonus assessment while the investment strategy remained in play (or to put it another way, had yet to be settled and remained unresolved). If BERG wanted an option to have its work assessed at a point of its choosing *before* PSCM's position was closed, it could have included such an option in the draft Agreement it prepared for PSCM's consideration. It did not do so. In the very language that it

had drafted, BERG contracted for the financial benefit to be assessed when the case was settled or resolved, not at a time when BERG preferred that it be settled or resolved.[7] Notably, the Amended Complaint acknowledges that Mr. Ackman advised BERG in May 2015 that he would wait until PSCM closed its Herbalife position before determining whether BERG was entitled to a premium. ¶¶52, 54. That is consistent with the "settled or resolved" language of the Agreement, for unrealized or hypothetical gains at a juncture handpicked for BERG's advantage do not reflect actual financial benefits to PSCM warranting a success fee. *Cf. Bernard-Thomas Bldg. Sys. v. The Weitz Co.*, 2005 WL 734175, at *2 (D. Conn. Mar. 28, 2005) (obligation in construction contract conditioned upon "final completion of project" required conclusion of entire construction project, not just plaintiff sub-contractor's work on the project).

While never stating so expressly, BERG intimates that assessing its financial benefit in March 2015 was required because that was when it was told to "stand down" and thus the case was, for them, "settled or resolved" at that point. ¶37. Nothing in the Agreement supports that notion and, in any event, BERG acknowledges that it continued to work on behalf of PSCM's Herbalife effort well after March 2015. ¶40 (third bullet).

More to the point, to the extent there was any obligation to assess the financial benefit for PSCM in March 2015 (and there was not), BERG concedes that, at most, there was the *possibility* of a financial benefit at that time. The Amended Complaint says, in three places

[7] To the extent BERG may argue that language in the success-fee provision in ambiguous, "[i]t is axiomatic in contract law that ambiguous contract language is construed against the drafter." *Matter of Arbitration between Mitsubishi Corp. of Tokyo & Conakry*, No. 92 CIV. 8587 (PKL), 1993 WL 254994, at *4 n.3 (S.D.N.Y. June 30, 1993); *see also Aircraft Servs. Resales LLC v. Oceanic Capital Co.,* No. 09 CIV. 8129 PKC, 2013 WL 4400453, at *4 (S.D.N.Y. Aug. 14, 2013) ("New York law provides that ambiguities in a contract must be construed against the drafter.").

no less, that PSCM "*would have*" realized a financial benefit had it closed its position in March 2015 (¶¶36, 37, 47). But the fact that a condition precedent might *possibly* have been satisfied earlier does not mean that the condition was satisfied, particularly where, as here, the Agreement says nothing obligating PSCM to abide by BERG's investment advice, an area in which it claims no knowledge or expertise.

Courts do not countenance efforts to read conditions precedent out of contracts. In an analogous authority, a court in this District dismissed on the pleadings a plaintiff employee's breach of contract claim for a bonus payment because the agreement contained a condition precedent that the employer must meet a certain threshold of financial performance. *Baraliu v. Vanya Capital, L.P.*, No. 07 Civ. 4626 (MHD), 2009 WL 959578, at *6 (S.D.N.Y. Mar. 31, 2009). Because that condition precedent was not satisfied, the plaintiff was not entitled to his bonus payment. *Id.* The same principle is fatal to BERG's claim here.

B. PSCM's Decision Not To Award A Success Fee To BERG Was Not Arbitrary Or Unreasonable

Regardless of when the bonus was to be considered, the Agreement unambiguously vests PSCM with sole discretion to determine whether the Herbalife matter was settled or resolved to its financial benefit. The parties had agreed that "[t]he decision regarding the 'beneficial [financial] status' will be made by PS[CM] based on its evaluation of the work product delivered by BERG Associates." Ex. C, at 3.

When a contract affords discretion to a contracting party, courts may "not interfere with that discretionary determination unless it is performed arbitrarily or irrationally." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 392 (1995) (contracting party with discretion to determine whether condition precedent had come to bear "must be the final arbiter" – "not the courts"). *See also Schweizer v. Sirorsky Aircraft Corp.*, 634 F. App'x 827, 830 (2d Cir. 2015)

(contractual discretion requires that exercising party "promise not to act arbitrarily or irrationally in exercising [the] discretion").

The Amended Complaint contains *not a single allegation* that PSCM acted arbitrarily or irrationally in declining to pay a success fee to BERG. Rather, as noted above, BERG takes issue with the choice that PSCM made on a different issue, namely, when to close its short position in Herbalife. ¶¶36-37. Indeed, BERG characterizes *that* decision (and its decision to ask BERG to stand down) as a breach of the Agreement. ¶38. But the Agreement contains no obligation that PSCM consider (let alone abide by) BERG's investment advice; that is of course not why that investigative firm was hired.

The only allegations touching on the success fee determination itself concern the May 2015 meeting at which Mr. Ackman asked that BERG wait until PSCM closed its Herbalife position "and then he would re-visit BERG's entitlement to additional compensation." ¶54. BERG does not allege that Mr. Ackman's position was arbitrary or unreasonable. Nor could it plausibly do so given the "settled or resolved" language of the Agreement's success fee term.

Pleading deficiencies aside, there can be no colorable dispute that PSCM's decision was rational. However one may define success, PSCM's investment in Herbalife produced the opposite: a "significant loss" (¶48) that the financial press characterized as a "disaster" and a "surrender" with losses estimated in the nine figures. *See* Ex. F; note 4, *supra*. Given the financial failure of the Herbalife strategy, the fact that PSCM did not award BERG a $3 million bonus on top of the million-plus it had already paid cannot possibly be viewed as arbitrary or unreasonable.

BERG tries to sidestep the disastrous Herbalife outcome for PSCM by instead cabining the success-fee analysis to its own contributions in the matter. And so BERG touts the

supposed impact of its work on Herbalife's stock price over the course of its engagement. ¶¶34, 40 (first bullet). But based on the allegations of the Amended Complaint, and the stock market reaction that is fairly considered on this motion given those allegations, this gambit badly misfires.

For all its talk about Herbalife's stock price over time, the Amended Complaint contains only a single instance in which BERG's work was shared with the public, namely, during the "Big Lie" presentation of July 22, 2014. ¶¶30-32. Which begs the question: What happened to Herbalife's stock price on *that* day, when the information developed by BERG was shared with the market? The answer was not a happy one for shorts like PSCM. Herbalife's stock price *rose* as that information was shared with the market, and indeed increased by a whopping *25%* in a single day. Ex. D, at 1; *see also* Ex F. Given the decidedly *negative* impact on PSCM's short position on the sole occasion BERG cites for the public impact of its work, it cannot be plausibly argued that PSCM's decision not to award a bonus for that work was arbitrary or unreasonable.[8]

Assuming it were somehow reasonable under these circumstances for BERG to contend that its work benefitted PSCM's financial standing (and it is not), "reasonableness" is not the standard at issue here. As noted above, "irrational" or "arbitrary" is the touchstone prescribed by the courts: a much higher hurdle for BERG to scale. *See Schweizer*, 634 F. App'x

[8] BERG also tries to claim some credit for being the source of information assisting an FTC investigation concerning Herbalife. ¶40 (last bullet). But there, too, the public disclosure of the FTC settlement caused Herbalife's stock price to *increase*, a negative development for PSCM's short strategy. Ex. D, at 2.

at 830 (requiring "irrational" or "arbitrary" exercise of discretion). BERG has not come close to meeting this pleading burden.

II. BERG's Redundant Claim For Breach Of The Covenant Of Good Faith And Fair Dealing Fails As A Matter Of Law

The Court should also dismiss BERG's second cause of action, for breach of the covenant of good faith and fair dealing, because New York law does not recognize such a separate cause of action "when a breach of contract claim, based upon the same facts, is also pled." *Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 81 (2d Cir. 2002). "[W]hen a complaint alleges both a breach of contract and a breach of the implied covenant of good faith and fair dealing based on the same facts, the latter claim should be dismissed as redundant." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 125 (2d Cir. 2013) (citation omitted). *See also ETFMG,* 431 F. Supp. 3d at 250 n.39 (having sued for breach of contract, plaintiff cannot sustain separate claim for breach of good faith and fair dealing).[9]

BERG alleges no new facts for its breach of the covenant of good faith and fair dealing claim, and merely "repeats and incorporates" the allegations offered in connection with the breach of contract claim. ¶64. Under the law, that is not enough. Accordingly, BERG's claim for breach of the covenant of good faith and fair dealing fails as a matter of law.

[9] The result is no different under Florida law. *Amica Mut. Ins. Co. v. Morowitz*, 613 F. Supp. 2d 1358, 1362 (S.D. Fla. 2009) ("A claim for breach of the implied [covenant of good faith and fair dealing] is redundant where the conduct allegedly violating the implied covenant is duplicative of companion cause of action alleging breach of contract."), *quoting Arlen House East Condominium Ass'n, Inc. v. QBE Ins. (Europe) Ltd.*, 2008 WL 4500690, at * (S.D. Fla. Sep. 30, 2008).

CONCLUSION

For the foregoing reasons, PSCM respectfully requests that the Court dismiss the Amended Complaint. Because the Court has already ruled that "no further opportunities to amend will ordinarily be granted," Dkt. No. 48, and confirmed with BERG's counsel at the case management conference that BERG understood the Court's ruling before it amended its pleading, the Amended Complaint should be dismissed with prejudice.

Dated: January 15, 2021

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