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 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COMPASS LAW PARTNERS
Brian R. Della Rocca
51 Monroe Street, Suite 408
Rockville, Maryland 20850
Tel.: (240) 454-1013
bdellarocca@compass-law.com

POWHIDA & CANO, PLLC
Alexander Powhida
36 South Pearl Street
Albany, New York 12207
Tel.: (518) 486-8250
apowhida@powhidacano.law

Attorneys for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

PROCEDURAL HISTORY 6

ARGUMENT 6

I. BERG HAS STATED A CAUSE OF ACTION FOR BREACH OF CONTRACT PLAUSIBLY ENTITLING IT TO RELIEF 7

A. BERG HAS ADEQUATELY PLEAD THAT PSCM HAS FINANCIALLY BENEFITTED FROM BERG'S WORK 9

B. PSCM'S FAILURE TO PAY THE ADDITIONAL FEE WAS A BREACH OF THE CONTRACT AND WAS ARBITRARY AND UNREASONABLE 11

II. BERG HAS PROPERLY STATED A SEPARATE CAUE OF ACTION FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

511 West 232nd Owners Corp. v. Jennifer Realty Co.,
98 N.Y.2d 144 (2002) 11, 12

Am. Auto Ins. Co. v. Rest Assured Alarm Sys., Inc.,
786 F.Supp.2d 798 (S.D.N.Y. 2011) 7

Aschcroft v. Iqbal,
556 U.S. 662 (2009) 6

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 6

Hexagon Securities LLC v. Leawood Bancshares, Inc.,
2014 WL 1303516 (S.D.N.Y. 2014) 7, 8, 14

Kassner v. 2nd Ave. Delicatessen, Inc.,
496 F.3d 229 (2d Cir. 2007) 6

Law Debenture Trust Co. of New York v. Maverick Tube Corp.,
595 F.3d 458 (2nd Cir. 2010) 8

Tufamerica, Inc. v. Diamond,
968 F.Supp.2d 588 (S.D.N.Y. 2013) 6

VFS Financing, Inc. v. Falcon Fifty LLC,
17 F. Supp.3d 372 (S.D.N.Y. 2014) 7

Statutes, Rules, Codes & Regulations

Federal Rule of Civil Prodcedure 12(b)(6) 1

Plaintiff Business Exposure Reduction Group Associates, LLC ("BERG") submits this memorandum of law in opposition to the Federal Rule of Civil Procedure 12(b)(6) motion to dismiss submitted by Defendant Pershing Square Capital Management, L.P. ("PSCM").

PRELIMINARY STATEMENT

PSCM's motion to dismiss seeks to prematurely terminate BERG's properly stated causes of action claiming payment of fees fully earned for valuable services rendered and to which BERG is entitled according to the contract between PSCH and BERG. In this action, BERG seeks to recover payment due for services rendered to PSCM pursuant to a written contract in which PSCM engaged BERG to conduct an investigatory case based upon PSCM's concerns about Herbalife, Ltd. ("Herbalife"), a company in which PSCM managed various investment positions. The contract provided for an escalation of the base hourly rate to be paid under the contract in the event that the settlement or resolution of BERG's investigative case was "*beneficial to the financial standing of*" PSCM based on "*evaluation of the work product delivered by [BERG].*"

BERG conducted a thorough investigation into Herbalife, developing various information that was utilized by PSCM to guide its investment decisions and which PSCM revealed and utilized in media disclosures and public presentations, all of which resulted in the steady decline in the value of Herbalife stock through the date on which PSCM directed BERG to cease further development of the investigative case. From the date of BERG's engagement through resolution of its case as a result of PSCM's direction to cease further investigation, Herbalife's stock value decreased from an unadjusted price of $80.81 per share to $33.25 per share, a significant improvement in PSCM's short position in Herbalife as judged from the beginning of the engagement, resulting in direct and indisputable financial benefit from BERG's services. Despite

this clear financial benefit obtained, and despite demand, PSCM has refused to pay the escalated hourly fee BERG earned under the contract.

In its Amended Complaint, BERG has set forth in reasonable detail the factual bases stating a plausible claim for breach of contract under the terms of the contract and, in the alternative, a separate claim based upon a breach of the covenant of good faith and fair dealing due to PSCM's unreasonable and arbitrary actions which frustrated or prevented BERG's entitlement to the fee escalation. The Amended Complaint contains non-speculative factual details, not bare legal conclusions, which if proved, would reasonably be expected to result in BERG prevailing at trial. Having met the required pleading standard, there is no justification for dismissing the action and preventing BERG from seeking to recover for services rendered for the substantial financial benefit PSCM received.

STATEMENT OF FACTS

BERG engages in consulting, forensic accounting, and related investigative work. (Am. Compl. ¶7.) PSCM is in the business of providing management services for various investment funds, including making certain investment decisions for those funds. (Am. Compl. ¶6.) In December 2013, PSCM sought to engage BERG in order to utilize BERG's investigative skills and services to address PSCM's concerns about Herbalife. (Am. Compl. ¶¶10-17.) PSCM had taken an investment position with respect to Herbalife believed to have been a short position or positions beginning in 2012.[1] (Am. Compl. ¶19; Coffey Decl. Ex. E.)

[1] The Forbes article attached as Exhibit E to the Coffey Declaration notes that PSCM "ha[d] been betting against [Herbalife's] shares in a big way since December 2012." It also states that PSCM had, at some point prior to the date of the article, "restructured [PSCM's] short position in the company's shares" and asserts that PCM's put options were set to expire on January 17, 2015. Since PSCM did not ultimately close its short positions until 2018, as noted in the CNN Business article attached as Exhibit F to the Coffey Declaration, it is believed that PSCM must have either

PSCM, with the assistance of counsel, and BERG, without counsel, negotiated the terms of the engagement. (Am. Compl. ¶¶ 16.) On December 23, 2013, BERG was engaged by PSCM to perform certain enumerated investigative tasks, as set forth in the negotiated, written contract (the "Fee Agreement). (Am. Compl. ¶15-22; Coffey Decl. Ex. C.) By the Fee Agreement, PSCM engaged BERG to investigate Herbalife and present objective facts about the company, its product, and its operations, to potentially be used by PSCM in connection with its investment funds and its short position on Herbalife stock. (Am. Compl. ¶17-22.) Nowhere in the Fee Agreement is PSCM's particular investment position on Herbalife stock set forth and compensation to be paid under the Fee Agreement was *not* tied to PSCM's particular investment decisions. (Am. Compl. ¶¶18-24.) Rather, pursuant to the Fee Agreement, PSCM agreed to pay BERG for its services on an hourly basis, plus expenses, at the agreed upon rate of $200 per hour. (Am. Compl. ¶22.) In addition to the base hourly fee, the Fee Agreement provided that "[i]n the event that the case developed by [BERG] is settled or resolved in a manner that [PSCM] determines is beneficial to the financial standing of [PSCM], 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 [PSCM] based on its evaluation of the work product delivered by [BERG]." (Coffey Decl. Ex C; Am. Compl. ¶¶23, 24.)

After entering into the Fee Agreement, BERG's investigation into Herbalife produced significant information that PSCM utilized in its evaluation of Herbalife and in its disclosures to the public and to its shareholders. PSCM, through the use of the information provided by BERG, successfully drove down Herbalife's stock price in 2014 and 2015. (Am. Compl. ¶¶26-33;

---

restructured its short position again on or before the January 17, 2015 date or taken new short positions.

Powhida Decl. Exhibit A.) Specifically, BERG discovered tax and fraud issues with respect to the operation of Herbalife. (Am. Compl. ¶27.) BERG also uncovered that the distribution of Herbalife was closely tied to drug trafficking channels and that known drug traffickers were deeply involved in the company. (Am. Compl. ¶32.) Further, BERG provided investigative support for the position that Herbalife was targeting low-income Latin Americans as distributors and exploiting them. (Am. Compl. ¶32.) PSCM revealed the information provided by BERG to the press and used it in public presentations, including the July 22, 2014 "The Big Lie" presentation made by PSCM and its principal, William Ackman. (Am. Compl. ¶30). The result of BERG's work was unquestionably beneficial to PSCM and its financial standing. (Am. Compl. ¶33-35.) The Herbalife stock plummeted during the course of the engagement, from the $80.81 per share unadjusted price ($40.22 adjusted) when BERG was engaged on December 23, 2013 to a $33.25 per share unadjusted price ($16.63 adjusted) when PSCM directed BERG to cease developing its investigative case on March 12, 2015. (Am. Compl. ¶33-35; Powhida Decl. Ex. A.)[2] And, as viewed from the date of "The Big Lie" presentation alone, the Herbalife stock value dropped from $67.76 per share unadjusted price ($33.88 adjusted) at close on July 22, 2014 to $33.25 per share unadjusted price ($16.63 adjusted) on March 12, 2015, a decline of $34.51 per share for just the time from "The Big Lie" presentation to the date BERG was instructed to cease work. (Powhida Decl. Ex. A.)[3]

[2] It is worth noting that, during the decline of Herbalife's stock value, the S&P 500 significantly increased from 1,827.99 on December 23, 2013 to $2,040 on March 11, 2015. The decline in Herbalife's value, therefore, cannot be attributed to general market conditions. (Powhida Decl. Exhibit B.)

[3] Note that the stock price figures shown on Exhibit A to the Powhida Declaration are adjusted *vis-à-vis* a two for one stock split, such that the values in the relevant time are multiplied by two for their value at the relevant time.

Upon being advised to cease their investigative case, the principals of BERG strongly suggested that PSCM close its short position which would have unquestionably benefitted PSCM in reference to the date of BERG's engagement. (Am. Compl. ¶¶34-35.) Over the course of the engagement, the value of the Herbalife shares had declined by approximately $107,010,000.00 ($80.81 - $33.25 = $47.56 price per share multiplied by the shares for which PSCM had a short position, 2,250,00), thereby improving the value of the positions PSCM had taken by the same amount. (Am. Compl. ¶¶34-35). Based upon the significant financial benefit conferred by BERG's services and a reasonable, good faith review of the Fee Agreement, BERG had earned the fee escalation and demanded the same on March 24, 2015. (Am. Compl. ¶¶34, 35, 40, 41, 50-51.) PSCM and BERG met to discuss the demand and PCSM did not dispute the claim for payment, only requesting that BERG allow PSCM the opportunity to close its position. (Am. Compl. ¶¶52-54.) PSCM has since refused to make payment of the fee escalation amount, (Am. Compl. ¶61), thereby breaching the Fee Agreement.

Furthermore, BERG encouraged PSCM to close its position at the time of PSCM's determination to stop BERG's investigation. (Am. Compl. ¶35.) Instead PSCM elected not to close its stock position at a time when doing so would have been most beneficial to it and instead settled or resolved the investigative case by directing BERG to cease further development work. (Am. Compl. ¶¶36-37.) Considering that PSCM had directed BERG to cease further development of the investigative case, work that had resulted in the significant decline of Herbalife's per share price over the term of the engagement, it was unreasonable and arbitrary for PSCM to fail to close out its position. Nevertheless, PSCM closed its position years later in 2018 and, as reported in the press, sustained a realized loss on its position. (Am. Compl. ¶¶ 55; Coffey Decl. Ex. F.) The realized loss of PSCM and PSCM's determinations with respect to Herbalife stock have no relation

to the services of BERG, with BERG's development of an investigative case having been terminated by PSCM years prior. (Am. Compl. ¶34.)

PROCEDURAL HISTORY

BERG commenced this action by the filing of a complaint in the District of Massachusetts on December 10, 2019. (Dkt. No. 3.) PSCM moved to dismiss in that court based upon an assertion of lack of jurisdiction and for failure to assert a cause of action. (Dkt Nos 16-29..) The District of Massachusetts determined that the Southern District of New York was the proper venue for the case, thereby resolving jurisdictional issues, and denied PSCM's motion to dismiss without prejudice to its renewal. (Dkt. No. 29.) The case was transferred to this Court on December 1, 2020. Following transfer, the parties entered into a stipulation for the briefing of the renewed motion to dismiss, which was considered and approved by the Court at a case management conference on December 18, 2020. During the conference, the Court granted leave for BERG to file an amended complaint, which was done on December 31, 2020. (Dkt. No. 52.)

ARGUMENT

A court should deny a motion to dismiss where the plaintiff's pleading contains sufficient factual matter, accepted as true and drawing all reasonable inferences in the light most favorable to the pleader, to state a claim to relief that is plausible on its face. *See, Tufamerica, Inc. v. Diamond,* 968 F.Supp.2d 588, 592 (S.D.N.Y. 2013). "When deciding a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept as true all well-pleaded facts and draw all reasonable inferences in the light most favorable to the non-moving party." *Id.*, 968 F.Supp.2d at 592 (*citing Kassner v. 2nd Ave. Delicatessen, Inc.*, 496

F.3d 229, 237 (2d Cir. 2007)). The complaint need only "contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Aschcroft v. Iqbal*, 556 U.S. 662, 667-678 (2009)(*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The allegations need not be "[d]etailed factual allegations" to survive a motion to dismiss. *Id.* The allegations must simply present "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

BERG has pled two legally cognizable causes of action with sufficient factual detail, which must be accepted as true and construed in the light most favorable to BERG, thereby stating a claim that, if proved, would entitle BERG to relief.

Point I

BERG HAS STATED A CAUSE OF ACTION FOR BREACH OF CONTRACT PLAUSIBLY ENTITLING IT TO RELIEF

Under New York State law,[4] to sufficiently plead a cause of action for breach of contract, a plaintiff must allege "(1) the existence of a contract between [the plaintiff] and th[e] defendant; (2) performance of the plaintiff's obligations under the contract; (3) breach of the contract by th[e] defendant; and (4) damages to the plaintiff caused by th[e] defendant's breach." *VFS Financing, Inc. v. Falcon Fifty LLC*, 17 F. Supp.3d 372, 379 (S.D.N.Y. 2014). Where terms of a contract are unambiguous, "[b]ecause contract interpretation is generally a question of law, it is suitable for disposition on a motion to dismiss." *Am. Auto Ins. Co. v. Rest Assured Alarm Sys., Inc.*, 786 F.Supp.2d 798, 803 (S.D.N.Y. 2011). The Court should deny a motion to dismiss and allow the case to proceed where the terms of the contract are ambiguous. *See Hexagon Securities LLC v.*

[4] BERG agrees with PSCM that New York State law should be applied in this action.

Leawood Bancshares, Inc., 2014 WL 1303516, *2-4 (S.D.N.Y. 2014)(attached). "An agreement is ambiguous when it 'could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or businesses." *Id.* at *3 (citing *Law Debenture Trust Co. of New York v. Maverick Tube Corp.* 595 F.3d 458, 466 (2nd Cir. 2010).

In *Hexagon Securities LLC*, the Court denied a motion to dismiss based upon a contract that provided for a success fee for plaintiff should plaintiff's negotiations on behalf of defendant result in defendant entering into a restructuring agreement. A separate provision provided that the success fee would be paid upon closing. As it turned out, plaintiff assisted defendant into entering the written agreement, but the transaction failed to close. The plaintiff sued for its success fee asserting that all it was required to do to satisfy the condition precedent for the success fee was to negotiate and have the defendant enter into a written agreement for the restructuring. The defendant asserted that the transaction had to close as a condition precedent for the success fee to be payable. The Court in *Hexagon* found that both interpretations were reasonable and as such, defendant's motion to dismiss failed. *See Hexagon Securities LLC*, 2014 WL 1303516, *1-4.

In this action, BERG'S Amended Complaint sets forth factual allegations demonstrating each element of the cause of action for breach of contract with sufficient factual detail that, if proved, will reasonably entitle BERG to relief based upon BERG's reasonable construction of the Fee Agreement. PSCM has not disputed the proper pleading or factual basis for the establishment of the first two elements of the cause of action, that PSCM and BERG entered into a written contract and that BERG performed under the terms of the contract. PSCM admits the assertion and acknowledges acceptance and payment of the base fee due under the parties' contract. It does

not appear that PSCM disputes that BERG would be damaged if the additional payment were due and not paid. PSCM's sole point of contention is that it has not breached the contract because BERG was not entitled to the additional payment under PSCM's difference construction of the same terms of the contract. This is not a motion for summary judgment, however. It is a motion to dismiss. The question before the Court is not whether BERG will ultimately prevail, but rather whether BERG has stated facts that if proved are sufficiently plausible that BERG could prevail at trial. BERG has sufficiently stated such facts.

PSCM has set forth its own interpretation of the Fee Agreement's provisions on which it bases its motion for dismissal. However, reasonable different interpretations of the same contract provision exist.[5] BERG maintains that "case" means the BERG investigation work, and that "settled or resolved" means the conclusion of the BERG engagement. To the extent PSCM implies that there must have been a legal action and a court settlement or resolution, it is wholly detached from the language of the Fee Agreement, which makes no mention of any contemplated legal proceedings. (See the Moynihan Aff. ¶¶13-17, attached to Powhida Decl. Exhibit C.) Neither does the Fee Agreement state in unambiguous terms the nature of the financial benefit or timing for judging when the determination should be made. The Court can properly conclude that the Fee Agreement is ambiguous, which would dictate denial of the motion to dismiss to allow the parties to proceed with discovery and present a fully informed motion for summary judgment at the close of discovery. Where a contract provision is facially ambiguous and gives rise to interpretations

[5] PSCM asserts that BERG is the Fee Agreement drafter and that any ambiguity must be construed against BERG. However, the facts are not disputed that BERG, by non-attorneys, and PSCM, by attorneys, negotiated and drafted the Fee Agreement. Since the totality of the Fee Agreement was the result of both parties' drafting, there should be no construction against either party.

that may or may not result in relief to the plaintiff, a motion to dismiss should be denied. *See Hexagon*, at *4.

A. BERG HAS ADEQUATELY PLEAD THAT PSCM HAS FINANCIALLY BENEFITTED FROM BERG'S WORK.

In the Amended Complaint, BERG asserted specific factual allegations to demonstrate that PSCM did, in fact, financially benefit from BERG's services such that the additional payment would be due. As alleged in the Amended Complaint, at the market close on the date that PSCM engaged BERG to commence its investigative case, Herbalife stock was trading at an unadjusted price of $80.81 ($40.22 adjusted)[6]. (Am. Compl. ¶25.) After obtaining the useful information supplied by BERG as the results of its investigative case, PSCM systematically released details of various elements of the results to the public through the use of the media and in presentations to the public and its shareholders. (Am. Compl. ¶¶30, 31.) While PSCM desires to focus on the day of the presentation itself as being the basis for the assertion that there was no financial benefit (despite there being no textual basis in the Fee Agreement for using that date), the fact is that the historical stock prices attached to the Powhida Declaration demonstrate that, despite increasing in value in the immediate aftermath of that presentation, the price of Herbalife proceeded to drop consistently thereafter until the date that BERG was told to cease developing its investigative case, March 12, 2015, to a price of $33.25 ($16.63 adjusted). (Am. Compl. ¶¶34, 35.) At the date of PSCM's determination to have BERG cease active work on the investigative case, as judged from the date of BERG's engagement to the date of cessation, PSCM's financial position relative to Herbalife stock had improved by $107,010,000. (Am. Compl. ¶35.) Due to the existence of this financial benefit, BERG became entitled to the additional payment due under the parties' contract

[6] It is not clear whether PSCM asserts a different standard should be used for assessment of BERG's work *vis-à-vis* the starting point for the value of Herbalife's stock. If PSCM asserts that it is other than the date of the Fee Agreement, there is no textual basis in the Fee Agreement for that assertion.

and notified PSCM of such entitlement by letter dated March 24, 2015. (Am. Compl. ¶¶50-51.) In response PSCM asked BERG to wait while PSCM closed its position. (Am. Compl ¶54.) While BERG did not proceed to suit, at no time was it discussed that the determination of whether BERG was entitled to its fee escalation was based on PSCM's financial results at a later date. Rather BERG believed that its fee escalation was fully earned but was awaiting PSCM's liquidation of its position to make payment. PSCM's failure to make payment of the additional fee was a breach, for which BERG has stated a proper claim.

PSCM makes various assertions in its motion to dismiss that the Amended Complaint refers to what PSCM's gain "would have been" had PSCM closed its positions on the date PSCM directed BERG to cease work. The argument contorts the purposes of the allegations – to demonstrate the value of the unrealized gain that PSCM had as a result of BERG's case work, into a non-contractually based assertion that PSCM's financial benefit had to be realized. There is no basis in the parties' contract for the assertion that the financial benefit had to be realized at the end of the BERG engagement or PSCM's total investment. The contract merely calls for resolution of the case developed by BERG to be "beneficial to the financial standing" of PSCM. There is no requirement that PSCM have a realized gain on the date the case, BERG's investigative work, is resolved. PSCM had attorneys review and comment on the proposed contract and they inserted no such requirement. There is no basis, especially on a motion to dismiss, for the Court to imply such a requirement.

B. PSCM'S FAILURE TO PAY THE ADDITIONAL FEE WAS A BREACH OF THE CONTRACT AND WAS ARBITRARY AND UNREASONABLE.

Implied in all contracts is a requirement that the parties act in good faith and not in an arbitrary or unreasonable manner. *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). PSCM breached its agreement with BERG by arbitrarily and unreasonably

refusing to pay the additional fee on the substantial benefit provided by BERG. The parties' contract provided that PSCM would pay the additional fee when the case was "settled or resolved" in a way that PSCM determines that the case developed by BERG was beneficial to the financial standing of PSCM. This determination was to be made by PSCM "based on its evaluation of the work product delivered by BERG."

As noted above, PSCM utilized the work product of BERG in its campaign to drive down Herbalife's stock price. PSCM's use of the information developed by BERG in its campaign that resulted in the significant drop in the stock price of Herbalife clearly shows the work product's "beneficial status" whether PSCM realized a benefit or not at some point in the future, long after PSCM had directed BERG to cease work on its engagement.

It was not BERG who caused the huge losses apparently suffered by PSCM nor was it a result of BERG's work product delivered to PSCM. Arguably, market forces and, in poker terms, not knowing when to call, caused the losses. When BERG was told to stand down by PSCM, PSCM was listing its short position on Herbalife in its 2014 Annual Report as one of its "Winners" and it is likely PSCM was using the unrealized value of its short position on Herbalife to woo new investors and to raise additional funds from existing investors.

The objective facts asserted show that PSCM was placed in a substantially better financial position as a direct result of BERG's work, showing an unrealized improvement of $107,010,000 from the date of BERG's engagement to the date PSCM told BERG to cease further work on its case. It was at that time, when PSCM told BERG to cease further work on its case, that the investigative case was "settled and resolved". It is certainly arbitrary and unreasonable to argue that PSCM had not benefitted from BERG's work at that time.

Contrary to the assertion of PSCM, the Amended Complaint alleges facts demonstrating that PSCM acted in an arbitrary and unreasonable manner. Throughout the Amended Complaint, there are allegations that PSCM had substantially benefitted from the work of BERG, placing PSCM in a significantly better position than it had been. Where PSCM had been so substantially benefitted from the work of BERG, the refusal to make payment is factually unreasonable and arbitrary.

Point II

BERG HAS PROPERLY STATED A SEPARATE CAUSE OF ACTION FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance." *511 West 232nd Owners Corp.*, 98 N.Y.2d at 153 (citations omitted). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* at 153. The alternative causes of action are not necessarily mutually exclusive, even when based upon the same fact pattern as supports a breach of contract claim. *See Hexagon Securities LLC*, 2014 WL 1303516, *4. Further, "[w]hile the duties of good faith and fair dealing do not imply obligations 'inconsistent with the other terms of the contractual relationship' [citation omitted] they do encompass 'any promises which a reasonable person in the position of the promise would be justified in understanding were included'." *511 West 232nd Owners Corp.*, 98 N.Y.2d at 154.

In this action, BERG has pleaded a separate and legally distinct alternative cause of action for breach of the covenant of good faith and fair dealing. Specifically, should the trier of fact not find that BERG is entitled to relief on its breach of contract claim based upon PSCM having undeniably received a financial benefit as judged by the improvement of its position in Herbalife stock during the engagement, from December 23, 2013 to March 12, 2015, then BERG pleads in

the alternative that by PSCM failing to close its position upon the BERG's recommendation and, instead, instructing BERG to cease further work, while PSCM attempted unsuccessfully to drive the Herbalife stock to zero, PSCM arbitrarily and unreasonably acted to prevent BERG from obtaining the benefit of the fee escalation allowed under the Fee Agreement.

In addition, PSCM's failure to assess BERG's work as benefitting its financial position was nothing short of self-serving and arbitrary. PSCM looked to avoid its obligation to pay the additional fee by using BERG's work product in attempting to further drive the stock price down on its own. Its efforts were simply designed to cut BERG out of the equation and certainly lacking in good faith.

This is similar to the situation presented in *Hexagon*, where the plaintiff pleaded in addition to a breach of contract claim for failure of defendant to pay a success fee, a claim for breach of the covenant of good faith and fair dealing due to defendant's withholding information from plaintiff designed to frustrate its claim to the success fee. *Id.* at *4. The court in *Hexagon* rejected a motion to dismiss based on the assertion that the claims were based on the same set of facts, finding the nature of the claims separate and allowable at the motion to dismiss stage. *See id.* In this action, the relevant facts are the same for both causes of action, but the basis for each is supported by separate wrongs. The breach of contract claim is supported by BERG's assertion that it has satisfied the contractual terms by the very language of the Fee Agreement. If, however, PSCM were to ultimately prevail in its interpretation of the Fee Agreement, then BERG is still entitled to seek relief based upon the assertion that PSCM acted to frustrate the purpose of the fee escalation clause, thereby denying BERG the benefits of its agreement.

It is especially appropriate for each cause of action to proceed in this case. As noted in the exhibits to the Coffey Declaration submitted on the motion to dismiss, PSCM appears to have

taken its position on Herbalife stock to an extreme state. Specifically, PSCM's principal aimed to drive Herbalife stock to zero. Coffey Declaration, Exhibit F. As set forth in the exhibits supplied by PSCM, it appears that PSCM pushed his positions in Herbalife beyond all reasonable constraints in a reckless manner that did, ultimately, result in PSCM suffering an apparent loss. It is precisely on this bases that BERG's separate claim for breach of the covenant of good faith and fair dealing should be allowed to proceed. BERG's award of the fee escalation allowed under the Fee Agreement should not be calculated against the reckless gamble of PSCM to put Herbalife out of busines, a gambit that acted to deprive BERG of the benefit of its bargain, but should, instead, be calculated against the obvious benefit created by BERG's investigation up to the point BERG was told to cease further investigative work.

CONCLUSION

BERG has stated a short and plain statement of its claims which, if proved, will entitle BERG to relief. It makes sufficient factual assertions to demonstrate that the claims have facial plausibility such that it is reasonable to infer that, if the facts as BERG pleads them are proved at trial, PSCM is liable for the claims.

As a result, BERG respectfully requests that the Court deny PSCM's motion to dismiss and allow the parties to proceed to discovery on BERG's well-stated claims.

Dated: February 12, 2021

/s/ Brian R. Della Rocca	/s/ Alexander Powhida
Brian R. Della Rocca (*Pro Hac Vice*)	Alexander Powhida
Compass Law Partners	Powhida & Cano , PLLC
51 Monroe Street, Suite 408	36 South Pearl Street
Rockville, Maryland 20850	Albany, New York 12207
Telephone No.: (240) 454-1013	Telephone No.: (518) 486-8250
Email: bdellarocca@compass-law.com	Email: apowhida@powhidacano.law

2014 WL 1303516
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

HEXAGON SECURITIES LLC, Plaintiff,
v.
LEAWOOD BANCSHARES, INC., Crossfirst Bank Leawood f/k/a Town & Country Bank, Crossfirst Holdings, LLC, Crossfirst Bank, Cross First Advisors, LLC, Dennis Bartkoski, David O'Toole, Defendants.

No. 13 Civ. 907(JSR).
|
Signed July 15, 2013.
|
Filed March 14, 2014.

MEMORANDUM ORDER

JED S. RAKOFF, District Judge.

***1** On February 7, 2013, plaintiff Hexagon Securities LLC ("Hexagon"), a financial advisory services company, brought this action alleging claims of breach of contract and breach of the duty of good faith against Leawood Bancshares ("Leawood") and CrossFirst Leawood Bank (formerly "Leawood Bank"), as well as claims of fraud and unjust enrichment against Leawood, Leawood Bank, and the remaining defendants. On April 11, 2013, defendants filed a motion to dismiss the complaint in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated herein, the Court denies in part and grants in part defendants' motion to dismiss.

On a motion to dismiss under Rule 12(b)(6), a court must assess whether the complaint "contain[s] 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) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Here, the facts alleged in the complaint, taken most favorably to Hexagon, are as follows:

In September 2005, Leawood, the then-owner of Leawood Bank, created Leawood Bancshares Statutory Trust I (the "Leawood Trust"), to which it issued $4 million in securities. Compl. ¶ 15. Leawood Trust in turn issued Trust Preferred Securities ("TruPS") with a $4 million par value to Alesco Preferred Funding X ("Alesco"), a foreign investment entity. *Id.*

By 2009, Leawood Bank was on the brink of collapse, and defendants CrossFirst Holdings LLC ("CrossFirst") and CrossFirst Bank agreed to purchase the bank's assets from Leawood. *Id.* ¶ 16. An integral part of that deal was Leawood's promise that it would repurchase the TruPS from Alesco. *Id.* ¶¶ 16–17. In order to accomplish this objective, Leawood, on October 5, 2009, entered into a written agreement (the "Agreement") with Hexagon to negotiate the repurchase of the TruPS from Alesco (the "restructuring"). *See id.* ¶ 19 & Ex. A (Agreement ¶ 1). Under the Agreement, if Leawood entered "into an agreement relating to a Restructuring of its Trust Preferred Securities" by April 5, 2010, Leawood agreed to "pay Hexagon a success fee" (the "Success Fee") determined by the price Hexagon negotiated for the TruPS. Compl. ¶¶ 20, 24 & Ex. A (Agreement § 3). Hexagon was not otherwise entitled to receive any compensation under the Agreement.

On March 1, 2010 (within the time period required under the Hexagon–Leawood Agreement), Leawood entered into a contract with Alesco to repurchase the TruPS for $1 million. Compl. ¶ 28. Alesco, however, failed to follow through on its obligations, and Leawood subsequently sued Alesco for breach of contract. In *Leawood Bancshares, Inc. v. Alesco Preferred Funding X, Ltd.,* 823 F.Supp.2d 244 (S.D.N.Y.2011), this Court granted partial summary judgment to Leawood, finding that Alesco had breached its agreement with Leawood and that CrossFirst, a third party beneficiary under that agreement, was also entitled to damages. Thereafter, on November 30, 2011, the parties stipulated to a damages award of $3,458,339.45. *See* Order, No. 10 Civ. 5637, ECF No. 65 (S.D.N.Y. Nov. 30, 2011).

***2** On March 30, 2012, Alesco, Leawood and CrossFirst Holdings came to an agreement on the payment of these damages, which entailed, *inter alia,* Alesco transferring the TruPS back to Leawood, and Cohen & Company, Alesco's collateral manager, paying $2.25 million on behalf of Alesco. Compl. ¶ 40. Upon learning of the transfer of the TruPS, Hexagon sought from Leawood payment of the Success Fee

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

to which it claims it is entitled under the Agreement. *Id.* ¶ 41. This suit followed.

In their motion to dismiss, defendants first argue that, under the unambiguous terms of the Leawood–Hexagon Agreement, Hexagon is not entitled to the Success Fee. "Because contract interpretation is generally a question of law, it is suitable for disposition on a motion to dismiss." *Am. Auto. Ins. Co. v. Rest Assured Alarm Sys ., Inc.,* 786 F.Supp.2d 798, 803 (S.D.N.Y.2011). Concomitantly, "[t]he matter of whether the contract is ambiguous is a question of law for the court." *Law Debenture Trust Co. of New York v. Maverick Tube Corp.,* 595 F.3d 458, 465 (2d Cir.2010).

In this regard, the critical question at this stage is whether the closing of the restructuring transaction is unambiguously a condition precedent to Hexagon's entitlement to the Success Fee. The parties' dispute centers on certain provisions in the Agreement and on the understanding of the Agreement as a whole. Of particular relevance is section 3 of the Agreement. Section 3 provides, first, that if Leawood "enters into an agreement relating to a Restructuring of its Trust Preferred Securities during the period from the date hereof to the date that is 6 months from the date of this Agreement (the 'Termination Date'), [Leawood] will pay Hexagon a success fee (the 'Success Fee')" under a contractually provided formula. Agreement § 3. The parties agree that, because the Hexagon Agreement was dated October 5, 2009, the Termination Date was April 5, 2010, and that Leawood entered into a restructuring agreement with Alesco on March 1, 2010, which falls before the Termination Date. Section 3 next provides that "[a]ny Success Fee payable hereunder shall be paid by [Leawood] upon the closing of a Restructuring." *Id.* Finally, section 3 states that, "[n]otwithstanding the foregoing, if any transaction that would have constituted a Restructuring is consummated within 9 months after the Termination Date, Hexagon shall be entitled to any Success Fee that it would otherwise have received if such Restructuring had occurred prior to the Termination Date, payable at the closing of such transaction." Agreement § 3. The parties agree that the relevant date under this latter provision is January 5, 2011.

In its motion to dismiss, Leawood argues that its obligation to pay Hexagon a Success Fee is conditioned on a timely closing of the restructuring of the TruPS by January 5, 2011. Although, in isolation, the first portion of section 3 requires Leawood to pay Hexagon the Success Fee if Leawood "enters into an agreement" within the contractual time window, Leawood argues that this provision must be read in light of the later clauses in the contract providing that the Success Fee "shall be paid ... upon closing," and that Hexagon is entitled to the Success Fee "if any transaction that would have constituted a Restructuring is consummated [*i.e.,* completed] within 9 months after the Termination Date." These provisions, Leawood argues, establish by implication that there are two conditions to Hexagon's entitlement to the Success Fee: first, that Leawood and Alesco enter into an Agreement for the restructuring of the TruPS before April 5, 2010, which did occur; and, second, that that transaction close before January 5, 2011, which did not occur. Since the latter condition was not satisfied, Leawood contends that Hexagon can assert no breach of contract claim.

***3** Hexagon disputes the notion that its entitlement to the Success Fee is conditioned on anything other than Leawood "enter[ing] into an agreement relating to a Restructuring." Thus, according to Hexagon, Section 3's requirement that the Success Fee "shall be paid ... upon the closing of a Restructuring" merely defines the time for payment, and is not a condition precedent to payment. Hexagon further argues that Leawood's combined reading of the three clauses of section 3 of the Agreement does not comport with their plain meaning. In particular, Hexagon claims that the "Notwithstanding" provision is a "tail" provision meant to create an alternative pathway for Hexagon to earn its Success Fee; that is, Hexagon argues, this provision merely means that Hexagon would be entitled to a Success Fee if Leawood entered into a restructuring agreement after April 5, 2010 but before January 5, 2011. To this end, Hexagon claims that the introductory phrase "Notwithstanding the foregoing" implies that the terms within that sentence apply only if the foregoing condition was not met, and that Leawood's reading of section 3 would change the meaning of the word "notwithstanding" to "in addition to," which, Hexagon argues, is implausible. Under Hexagon's reading, therefore, because Leawood entered into an agreement with Alesco in March 2010, the "notwithstanding" clause never came into play and is irrelevant to the instant dispute.

An agreement is ambiguous when it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Law Debenture Trust Co.,* 595 F.3d at 466. Here, the Court finds both sides' reading of the relevant language to be plausible interpretations of the

Agreement. It is unclear whether the Agreement's use of the phrase "upon the closing" is intended to state a condition or merely sets the time for payment.

Nor does the rest of the Agreement unambiguously determine which meaning is intended. Leawood argues that section 6 of the Agreement, which provides that "nothing contained herein shall extend the period of time in which Hexagon may be entitled to receive a Success Fee beyond the period set forth in Section 3 above," Agreement § 6, confirms its reading because that provision would be rendered meaningless if closing were not required by January 5, 2011. But this argument only follows if the Court were to accept Leawood's premise that "entitle[ment] to receive a Success Fee" is conditioned on closing. That is, even under Hexagon's reading, section 3 limits the time period during which Hexagon may be entitled to a success fee; it is merely the triggering event (signing an agreement vs. closing that agreement) that is different. Thus, section 6 does not resolve the parties' dispute over the meaning of section 3.

***4** Nor do the parties' attempts to analogize the instant Agreement to arrangements involving, *e.g.,* real estate brokers and subcontractors on construction projects resolve the issue of whether the "upon closing" provision creates a condition precedent or is merely a timing provision. *Compare Donald Yoo (New York) Corp. v. Laszlo N. Tauber, M.D. and Assocs.,* 281 A.D.2d 171 (N.Y.App.Div.2001) (finding that an agreement that a real estate broker's fee was to be paid upon consummation of the transaction meant that the closing of the of the transaction was a contingent precedent to payment of a broker's fee), *with Action Interiors v. Component Assembly Sys.,* 144 A.D.2d 606, 607 (N.Y.App.Div.1988) ("Absent a clear expression to the contrary, a contract provision that payment is not due the subcontractor until the owner has paid the general contractor does not establish a condition precedent for payment but merely fixes a time for payment").

Similarly, the parties' appeals to the assumed purpose of their Agreement fail to resolve the ambiguity. Leawood argues that, because it needed to quickly close its deal with CrossFirst and because the restructuring of the TruPS was a critical part of the Leawood–CrossFirst deal, a restructuring that closed many years later would not have been considered a success, and thus Leawood would have placed on Hexagon the burden of seeing the transaction through to the end in a timely fashion. Additionally, Leawood notes that, under the terms of the Agreement, the Success Fee cannot be calculated until the "purchase price paid" is determined, *see* Agreement § 3, which cannot be known prior to closing, suggesting that the Success Fee is contingent upon closing. At the same time, however, Hexagon asserts that it would not have entered into an agreement in which it bore the risk of a third party's breach, and payment was to be made at closing simply because Leawood, as a failing bank, would not have had the money to pay Hexagon until the transactions were completed. Given these equally persuasive explanations, the Court remains in equipoise between the parties' plausible interpretations of the Agreement. Moreover, both explanations rely to some degree on factual assertions not referenced anywhere in the pleadings and hence beyond the scope of the instant motion.

Accordingly, because the Hexagon–Leawood Agreement is facially ambiguous, the defendants' motion to dismiss Hexagon's breach of contract claim in its entirety must be denied.

Defendants also seek dismissal of the portion of Hexagon's breach of contract claim that relates to Hexagon's claim for reimbursement of $35,000 Hexagon paid to retain specialized counsel on Leawood's behalf after "Leawood advised Hexagon that Leawood could not afford to pay counsel in connection with the Leawood–Alesco negotiations and deal." Compl. ¶ 27. As to this issue, the Hexagon–Leawood Agreement provides that, subject to certain requirements, Leawood would "reimburse Hexagon for its reasonable out-of-pocket expenses incurred from time to time in connection with its services hereunder, ... provided, however, that such expenses shall not exceed $5,000 without the prior written consent of [Leawood]." Agreement § 3. Leawood argues that the complaint fails to allege that Hexagon received "prior written consent" from Leawood for the $35,000 in attorneys' fees, and thus Hexagon has failed to allege a breach with respect to these fees. However, even though the complaint does not specify that Leawood's request was "in writing," the complaint's allegation that Leawood affirmatively asked Hexagon to pay its legal expenses is sufficient at this stage to plausibly suggest the consent required by the Hexagon–Leawood Agreement. Thus, Hexagon's motion to dismiss this breach of contract claim is denied as well.

***5** Leawood and Leawood Bank next seek dismissal of Hexagon's claim for breach of the implied covenant of good faith and fair dealing because, they argue, the claim is based on the same facts as the breach of contract claim and therefore should be dismissed as redundant. Here, the complaint alleges that "Leawood and Leawood Bank ... breached their respective duties of good faith to Hexagon under the Contract

by, *inter alia,* failing to advise Hexagon of certain critical developments." Compl. ¶ 2. Specifically, Hexagon claims that "Leawood and Leawood Bank purposefully declined to advise Hexagon of any of the important events that took place after Alesco's initial refusal to sell the TruPS to Leawood, including but not limited to the restructuring of the TruPS, and Leawood's receipt of the benefit of the Leawood–Alesco agreement." *Id.* ¶ 63. Additionally, the complaint alleges that defendants David O'Toole, the CEO of CrossFirst Advisors, *id.* ¶ 13, and Dennis Bartkoski, the CFO of Leawood and Leawood Bank and the signatory on the Hexagon Agreement, *id.* ¶ 12, ignored Hexagon's attempts to reach the defendants after Hexagon invoiced Leawood for the Success Fee. *Id* . ¶¶ 42, 47. Although O'Toole eventually responded by email, the complaint alleges that he denied knowledge of an obligation to Hexagon, stating that he was "not sure what invoice [Hexagon was] talking about." *Id.* ¶ 47 & Ex. E.

Hexagon claims that implicit in its agreement with Leawood was an understanding that Leawood would share relevant information with Hexagon that was in its possession, and therefore its withholding of information denied Hexagon the ability to collect its fee. *See* *511 West 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 153 (2002) (stating that the covenant of good faith and fair dealing "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract"). Because the complaint's allegations, taken as true on a motion to dismiss, suggest that Leawood and the other defendants intentionally avoided informing Leawood that the restructuring had occurred and therefore that payment of the Success Fee was now due, Hexagon has plausibly pleaded that Leawood violated its implied pledge not to injure Hexagon's right to receive "the fruits of the contract." Thus, defendants' motion to dismiss Hexagon's claim for breach of the implied covenant of good faith and fair dealing is denied.

Turning to Hexagon's fraud claim, the complaint alleges that "[t]he Defendants committed fraud by, *inter alia,* getting Hexagon to provide substantial financial advisory services and paying Leawood's legal expenses with no intention of paying Hexagon for its services." Compl. ¶ 2; *see also id.* ¶ 69 ("[A]t the time Leawood and Leawood Bank entered into the Contract, they had no intention of complying with its terms, and the rest of the Defendants had no intention of compensating Hexagon."). Defendants seek dismissal of this claim, as "[t]he mere allegation that 'a defendant did not intend to perform a contract with a plaintiff when he made it' generally fails to state a claim for fraud," and therefore must "be dismissed as duplicative under New York law." *VTech Holdings Ltd. v. Lucent Technologies, Inc.,* 172 F.Supp.2d 435, 439 (S.D.N.Y.2001) (quoting *Gordon v. Dino De Laurentiis Corp.,* 529 N.Y.S.2d 777, 779 (App.Div.1988)); *see also* *N.Y. Univ. v. Cont'l Ins. Co.,* 662 N.E.2d 763, 769 (N.Y.1995) ("Where, as here, the complaint does not state the specific promises or omissions of material facts allegedly made by the insurer, it alleges nothing more than a breach of the contract and any covenants implied; it does not allege a cause of action for fraud in the inducement."). Since Hexagon's fraud claim is based on the non-actionable notion that the defendants had "no intention of paying Hexagon for its services," such claim must be dismissed with prejudice.

***6** Finally, defendants seek dismissal of Hexagon's unjust enrichment claim, arguing that such a claim cannot survive in the face of a valid agreement governing the subject matter of the claim. The complaint alleges that the defendants were "unjustly enriched by, *inter alia,* receiving and retaining the substantial benefit of Hexagon's services without compensating Hexagon." Compl. ¶ 2. Specifically, the complaint alleges that "Leawood and the rest of the Defendants have been enriched by ... the repurchase of the TruPS on terms favorable to Leawood, the satisfaction of the judgment Leawood obtained against Alesco, and Hexagon's payment of $35,000 to Leawood's counsel on Leawood's behalf," and "[i]t would be against equity and good conscience to allow the Defendants to retain" this benefit without compensating Hexagon. *Id.* ¶ 77, 79.

Under applicable New York law, unjust enrichment is a quasi-contractual obligation that "the law creates in the absence of any agreement," so "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Beth Israel Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.,* 448 F.3d 573, 586–87 (2d Cir.2006). Here, however, it is undisputed that Hexagon performed services for Leawood pursuant to a valid contract; the only question is whether Hexagon is entitled to payment under the Agreement. Even though Hexagon claims that certain of the services it provided were outside of the scope of the Agreement, the fact that it claims damages only in the amount of the Success Fee and reimbursement of the legal fees paid indicates that all of Hexagon's actions were in fact taken pursuant to its contract with Leawood. Because all of Hexagon's claim

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

thus fall under its Agreement with Leawood, Hexagon's unjust enrichment claims must be dismissed. *See* *Granite Partners, L.P. v. Bear, Stearns & Co. Inc.*, 17 F.Supp.2d 275, 313 (S.D.N.Y.1998) (dismissing unjust enrichment claim against both contracting and non-contracting parties based on the existence of a contract governing the same subject matter).

In sum, defendants' motion to dismiss is hereby denied as it relates to Hexagon's claims for breach of contract and breach of the implied covenant of good faith, but hereby granted as it relates to the fraud and unjust enrichment claims. It also follows that defendants CrossFirst Holdings, CrossFirst Bank, Cross First Advisors, Dennis Bartkoski, and David O'Toole—named only in the dismissed claims—must be and hereby are dismissed from the suit, but the suit continues against Leawood Bancshares and CrossFirst Leawood Bank.

The Clerk of the Court is directed to close item number 9 on the docket of this case.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 1303516

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.