SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ASCEND WELLNESS HOLDINGS, INC. and AWH NEW YORK, LLC, *Plaintiffs*, v. MEDMEN NY, INC., MM ENTERPRISES USA, LLC, PROJECT COMPASSION NY, LLC and PROJECT COMPASSION CAPITAL, LLC, *Defendants*.	Index No. 650220/2022 Hon. Margaret A. Pui Yee Chan Part 49 Motion Seq. No. 010 **Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS ASCEND WELLNESS HOLDINGS, INC. AND AWH NEW YORK, LLC'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

REGULATIONS

RULES

Ascend Wellness Holdings, Inc. and AWH New York, LLC (collectively, "Ascend") respectfully submit this memorandum of law in support of their motion to dismiss MedMen NY, Inc. ("MedMen NY"), MM Enterprises USA, LLC ("MM Enterprises"), Project Compassion NY, LLC and Project Compassion Capital, LLC's (collectively, "Defendants" or "MedMen") Verified Counterclaims, Answer, and Affirmative Defenses to the Complaint (the "Counterclaims").

PRELIMINARY STATEMENT

Relying on nothing more than two false allegations in an attempt to plead its infirm Counterclaims, MedMen has knowingly fabricated a narrative that Ascend exerted undue influence on New York State government officials in order to obtain regulatory approval of the transaction whereby MedMen agreed to sell its outstanding shares to Ascend and through which Ascend will obtain one of New York's ten licenses to distribute medical cannabis (the "Transaction"). Contrary to the allegations in the Counterclaims, no one from Ascend attended a fundraiser for the Governor on December 8, 2021. And no one from Ascend met with the Governor or anyone from her staff on December 10, 2021. MedMen knows that those allegations are lies. And without those allegations, the alleged "highly suspect sequence of events" (Counterclaims ¶ 13) that underpins MedMen's Counterclaims falls apart.

The Court should see the Counterclaims for what they really are—a transparent attempt by MedMen to distract from its own malfeasance in seeking to kill the agreed-upon sale of MedMen NY to Ascend. This dispute is nothing more than a case about seller's remorse. But MedMen agreed to issue new shares and sell its currently outstanding shares (and license) to Ascend and it should be held to the contract it negotiated and bargained for. In February 2021, MedMen agreed to sell its New York operations to Ascend. But after signing the deal, MedMen determined that its best path forward was to avoid the bargain it had negotiated with Ascend by letting the clock run out on their Transaction before conditions precedent to closing had taken place.

The irony of MedMen's position should not be lost on the Court—while MedMen sat idly on its hands and took little to no action in order to obtain regulatory approval from the government to close the Transaction despite its obligation under the parties' February 2021 agreement to use commercially reasonable efforts to obtain that approval, MedMen now accuses Ascend of using too much commercially reasonable effort in order to get the deal closed. And not only is MedMen's position ironic, it is also illogical. MedMen alleges that Ascend used undue influence on government officials in order to obtain regulatory approval of the Transaction, but in the next breath argues that the regulatory approval was not sufficient. MedMen's false, ironic and illogical allegations should not be countenanced by this Court, and its corresponding Counterclaims should be dismissed.

First, MedMen's Counterclaim (Count I) seeking a declaration that its termination of the Investment Agreement was valid is wholly unnecessary. That issue is already squarely presented in this litigation as it was raised in Ascend's original complaint, responded to by MedMen's affirmative defenses, and remains the first claim in the Amended Complaint that Ascend has simultaneously filed herewith. *See* Am. Compl. Count II. Because MedMen's declaratory judgment claim is merely the mirror image of Ascend's first-filed claims, it should be dismissed.

Second, three of MedMen's four contractual Counterclaims (Counts II–IV) and its Counterclaim for breach of the implied covenant of good faith and fair dealing (Count VI) are predicated on false allegations. MedMen alleges that Ascend executives met with government officials on December 8 and December 10, 2021. But no one from Ascend attended either an event or meeting with government officials on those dates. And there is irrefutable documentary evidence contradicting MedMen's fabricated allegations. MedMen alleges that Ascend's New York President was at a Manhattan fundraiser on December 8, 2021. However, he was in Albany that day (in fact, that entire week) appearing in federal court *pro bono* on behalf of an indigent party. Similarly, MedMen alleges

that Ascend's Chief Executive Officer attended a meeting with various New York officials on December 10, 2021. But Ascend's CEO was not even in the State of New York on that day. As a result, each Counterclaim premised on these false allegations must fail. Moreover, the underlying allegations should be stricken from the record.

Third, each of MedMen's breach of contract Counterclaims (Counts II–V) must be dismissed because MedMen has not adequately pleaded that it suffered any damages caused by Ascend's purported breaches. Although MedMen summarily asserts that Ascend's conduct somehow interfered with the closing of the Transaction and potentially imperiled the legal status of MedMen's operations in New York and elsewhere, it has not alleged any facts supporting either concocted theory.

Fourth, two of MedMen's breach of contract claims (Counts II–III) are premised on the notion that the parties' obligation to use "commercially reasonable efforts" to satisfy the closing conditions of the Transaction somehow precluded Ascend from attending political fundraisers or meeting with government officials. But that is a flagrant misreading of the Investment Agreement. Nothing in the Investment Agreement precludes such conduct.

Fifth, MedMen asserts that Ascend breached a contract provision precluding it from communicating with government officials "in connection with the transactions contemplated" by the parties' agreement (Count IV). But MedMen has not alleged that any such communications actually took place. Although MedMen claims that Ascend executives attended a fundraiser and meeting in December 2021, there are no allegations concerning the substance of any communications that occurred during those events. Even accepting MedMen's allegations as true (which they are not), those allegations would not amount to a violation of the Investment Agreement.

Sixth, MedMen's Counterclaim for breach of the implied covenant of good faith and fair dealing (Count VI) should be dismissed for the additional reason that it is duplicative of its contract claims.

For the reasons discussed above, and as further set forth below, each of MedMen's Counterclaims is more meritless than the last. Accordingly, each should be dismissed.

STATEMENT OF FACTS[1]

A. Ascend and MedMen Enter Into the Investment Agreement.

MedMen, through MedMen NY, is a cannabis operator that holds one of only ten licenses issued by the State of New York to manufacture and dispense medical marijuana (the "License"). Denerstein Aff, Ex. A (Counterclaims, NYSCEF Doc. No. 27), ¶ 23. Ascend is a vertically integrated cannabis company that operates in several states and has its headquarters in New York. *Id.* ¶ 19. In February 2021, MedMen agreed to sell a controlling interest in MedMen NY to Ascend as part of a deal that provided MedMen with desperately needed debt relief. *Id.* ¶¶ 3, 24. The parties agreed to execute the Transaction in three contracts: (i) a Working Capital Advance Agreement, (ii) a Management and Administrative Services Agreement, and (iii) an Investment Agreement (collectively, the "Agreements").

Under the Investment Agreement, Ascend will obtain a controlling interest in MedMen NY equal to approximately 87% of its equity upon the closing of the Transaction. *Id.* ¶ 24; Denerstein Aff. Ex. B (Investment Agreement), § 2.1(b). The Investment Agreement also provided an irrevocable option for Ascend to acquire the remainder of MedMen NY's equity after the

[1] Except where otherwise noted, all allegations in MedMen's Counterclaims are accepted as true for purposes of this Motion only and Ascend expressly reserves the right to subsequently challenge the veracity of MedMen's allegations. For a more complete and accurate description of the events at issue, Ascend respectfully directs the Court to the facts set forth in its Amended Complaint, filed contemporaneously herewith.

Transaction closed for the nominal sum of $1 per share, a total of $400. *See* Ex. B § 7.2(n). In effect, the parties thus agreed to give Ascend full ownership and control of MedMen NY after closing the Transaction because the option to acquire the remaining 13% of MedMen NY, a multi-million dollar company, would inevitably be exercised at that price.

B. The Investment Agreement Sets Out the Parties' Obligations.

New York law requires government approval for any ownership changes of registered license holders, such as MedMen NY. *See* 10 N.Y.C.R.R. § 1004.10(b). Accordingly, the Investment Agreement made such approval a condition precedent to close the Transaction. Ex. A. ¶ 26. Furthermore, it included several provisions governing the parties' efforts to obtain such approval.

The Investment Agreement required both Ascend and MedMen to work together to obtain government approval "as promptly as possible." Ex. B § 5.8(a). To do so, it specifies that the parties shall (i) "make, or cause or be made, all filings and submissions required under any Law applicable," (ii) "use commercially reasonable efforts to obtain, or cause to be obtained, all Permits, consents, authorizations, orders and approvals from all Governmental Authorities that may be or become necessary for its execution and delivery of this Agreement," and (iii) use "commercially reasonable efforts" to "give all notices to, and obtain all consents," including from the New York Department of Health. *Id.* § 5.8(a)–(b). Further underscoring the importance of working collaboratively and quickly, the contract also states that "[e]ach party shall cooperate fully with the other party . . . in promptly seeking to obtain all" necessary approvals. *Id.* § 5.8(a). And it prohibits the parties from "willfully taking any action that will have the effect of delaying, impairing or impeding" any approval. *Id.*

Section 5.11 of the Investment Agreement also required that the parties "use commercially reasonable efforts to take such actions as are necessary to expeditiously satisfy the [contract's]

closing conditions," which are set forth in Section 7 thereof. Section 7.1 incorporated the parties' obligations under Section 5.8 to work together to obtain approval "from the Governmental Authorities" for Ascend's purchase of MedMen's shares. *Id.* § 7.1(b). Also among the closing conditions is that Ascend and MedMen obtain the necessary government approvals and consents. *Id.*

Once the closing conditions were met, including receipt of government approval, the Investment Agreement required MedMen and Ascend to close the Transaction within five days. *Id.* § 2.2(a). If the closing conditions were not met by December 31, 2021 (defined as the "Outside Date"), Section 9 provided the parties with various termination rights.

C. MedMen Fails to Use Commercially Reasonable Efforts in Seeking Regulatory Approval.

Following the parties' execution of the Agreements in February 2021, New York enacted the Marihuana Regulation and Taxation Act on March 31, 2021. Ex. A ¶ 37. That legislation legalized adult-use cannabis and changed the way licenses for the production and distribution of cannabis are regulated in the state. *Id*. It also created a Cannabis Control Board (the "Board") consisting of a chairperson and four other members, which has the authority to grant, amend, and revoke cannabis licenses. *Id.* ¶ 38–39. In addition, it created an Office of Cannabis Management (the "OCM") to help administer and execute the duties and responsibilities of the Board. *Id.* ¶ 40.

Although MedMen acknowledges that the original approval of its License in 2017 required "an extended back-and-forth with regulators . . . who made a series of requests for additional information regarding the company and the transaction," it concedes that its License transfer efforts under the Investment Agreement consisted of "only two brief calls with state officials" in March and April. *Id.* ¶¶ 35–36, 41. Notwithstanding its agreement to use commercially reasonable efforts to ensure that the closing conditions were satisfied in advance of the impending Outside

Date, MedMen nevertheless does not plead that it took any additional action in furtherance of obtaining the requisite governmental approval.

D. The Board Approves the Transaction on December 16, 2021.

Notwithstanding MedMen's lack of efforts to obtain regulatory approval for the Transaction, on December 16, 2021, the Board voted to approve "the change of ownership" of MedMen's License "contingent on the review of the proposed investment by the Office staff." *Id.* ¶¶ 42–43. In other words, the Board resolved to allow MedMen to transfer ownership of the License to Ascend, leaving any further details to be handled by the OCM.

After sitting on its hands for months, MedMen finally acted, but not to close the Transaction. Rather than take "yes" for an answer, MedMen instead questioned the nature of the Board's approval, even as Ascend responded it was ready to close. *Id.* ¶¶ 45–46. If there was any doubt that the Transaction had sufficient governmental approval, that doubt was completely eliminated by an email from the OCM's General Counsel, Rick Zahnleuter, on December 29, 2021. *Id.* ¶ 51. On that date, Mr. Zahnleuter wrote to the parties "to confirm that the Board, effective December 16, 2021, *approved of the referenced change in ownership of MedMen NY, Inc.* While such approval *constitute[d] final approval for the purposes of closing the transaction and enacting the transfer of ownership*," Mr. Zahnleuter clarified that "MedMen NY, Inc., must, as an ongoing Registered Organization, on a continuing basis, comply with all statutory and regulatory requirements, obligations and terms of operation." *Id.* (emphases added).

E. MedMen Purports to Terminate the Investment Agreement and Makes False Accusations Regarding Ascend.

Despite the state regulator's top legal representative confirming that New York had approved the closing of the Transaction, MedMen wrote to Ascend on January 2, 2022 that it was terminating the Agreement, purportedly because the parties had not received government approval

by December 31, 2021. *Id.* ¶ 64. According to MedMen, the Investment Agreement allowed it to reject any government approval that was not "reasonably satisfactory" to it. *Id.* ¶¶ 44, 64. In other words, it claimed the unilateral authority to ignore the express, written representations of the sole agency vested by the laws of the State of New York to grant approval of the ownership transfer. *Id.* ¶ 79. Plainly, that it not what any party intended or understood when entering into the Investment Agreement.

After MedMen's bad-faith misconduct forced Ascend to bring this lawsuit, MedMen responded by filing the Counterclaims that are demonstrably false. Four of MedMen's six Counterclaims (Counts II, III, IV, and VI) are based on the theory that the State improperly approved the Transaction because Ascend exerted undue influence on government officials. *Id.* ¶¶ 83–103, 110–14. More specifically, MedMen alleges that on December 8, 2021, AWH NY President Andrew Brown attended an in-person fundraiser for Governor Kathy Hochul in Manhattan, *id.* ¶¶ 12, 74, and that Ascend CEO Abner Kurtin met with "senior state executive officials" in Albany on December 10, 2021 (together, the "Government Meetings"), *id.* ¶¶ 12, 75.

These allegations are demonstrably false. Mr. Brown was not in Manhattan on December 8, 2021. Rather, he was representing an inmate *pro bono* in a trial in Albany for that entire week, as indisputably established by both court records and his hotel receipt reflecting that he did not leave Albany until December 10, 2021. *See* Denerstein Aff. Exs. C–E. And Mr. Kurtin was in Florida on December 10, 2021, as demonstrated by a receipt reflecting that he was in Pembroke Pines, Florida at 4 p.m. that afternoon. *Id.* Ex. F. Spokespeople involved with the fundraiser and the Governor's office have further denounced MedMen's false allegations.[2]

[2] *See* Josh Kosman, *Cannabis retailer to seek subpoena of Hochul's Office Over approval of Pot Firm Sale*, N.Y. Post (Feb. 1, 2022), https://nypost.com/2022/02/01/cannabis-retailer-to-seek-

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LEGAL STANDARD

On a motion to dismiss, "factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not" accepted as true, *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003) (citation omitted), and "are insufficient to survive" dismissal, *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009) (citation omitted).

Dismissal is appropriate under CPLR 3211(a)(1) if "documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002) (citation omitted). "To qualify as 'documentary,' the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts." *MBIA Ins. Corp. v. Royal Bank of Can.*, No. 12238/09, 2010 WL 3294302, at *20 (Sup. Ct. Aug. 19, 2010); *see also Fontanetta v. Doe*, 73 A.D.3d 78, 84–85 (2d Dep't 2010). "To the extent that [a party's] claims turn on a contract, the actual provisions of the contract—rather than Plaintiffs' characterization of the terms in their pleading—are controlling." *MBIA*, 2010 WL 3294302, at *21 (citations omitted); *see also 150 Broadway N.Y. Assocs., L.P. v. Bodner*, 784 N.Y.S.2d 63, 65 (1st Dep't 2004) ("where a written agreement . . . unambiguously contradicts the allegations supporting a litigant's cause of action for breach of contract, the contract itself constitutes documentary evidence warranting the dismissal of the complaint pursuant to CPLR 3211(a)(1)" (citations omitted)); *Taussig v. Clipper Grp., L.P.*, 13 A.D.3d 166, 167 (1st Dep't 2010) ("The interpretation of an unambiguous contract is a question of law for the court,

subpoena-of-hochuls-office-over-approval-of-pot-firm-sale ("These allegations are full of falsehoods. . . . None of the Governor's senior team members named here have ever met with these individuals.").

and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint.").

In addition, claims that are not "cognizable at law" may be dismissed pursuant to CPLR 3211(a)(7). *Basic Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 134 (1st Dep't 2014). That includes instances where a plaintiff has "failed to plead an essential element of their purported cause of action." *Doe v. CBS Broad. Inc.*, 24 A.D.3d 215, 215 (1st Dep't 2005).

ARGUMENT

I. COUNT I SHOULD BE DISMISSED BECAUSE IT IS THE MIRROR IMAGE OF ASCEND'S CLAIMS.

MedMen's first Counterclaim (Count I) presents an entirely redundant request for declaratory judgment. Specifically, MedMen seeks a declaration that its "termination of the Agreement was valid," Ex. A at 21, which is the very same question presented by Ascend's first-filed declaratory judgment claim against MedMen. *See* Compl. (NYSCEF Doc. No. 2), ¶ 72 (seeking a declaration that "the Agreement is valid and enforceable and binding on MedMen and that MedMen is in breach of the Agreement"); *cf.* Am. Compl. Count II (similar). Moreover, MedMen can obtain the same relief it seeks by prevailing on its first and twelfth affirmative defenses. *See* Ex. A at 31 ("The Complaint fails to state a claim on which relief can be granted.") *id.* at 32 ("Defendants' alleged conduct was lawful."). In other words, its declaratory judgment claim is "nothing more" than its affirmative defenses "repackaged and "is a mirror image of [Ascend's] claim" such that resolution "of [Ascend's] action would necessarily resolve" MedMen's declaratory judgment claim as well. *Worldwide Home Prod., Inc. v. Bed Bath & Beyond, Inc.*, 2013 WL 247839, at *3 (S.D.N.Y. Jan. 22, 2013) (striking declaratory judgment counterclaim). Because MedMen's declaratory judgment Counterclaim is "duplicative and[]

unnecessary," it "serves no purpose" and should be dismissed. *SL Globetrotter, L.P. v. Suvretta Cap. Mgmt., LLC*, No. 652769/2020, NYSCEF Doc. No. 132, at *4 (Sup. Ct. June 11, 2021) (Chan, J.).

II. COUNTS II–IV AND VI SHOULD BE DISMISSED BECAUSE THEY ARE BASED ON FALSE ALLEGATIONS REFUTED BY DOCUMENTARY EVIDENCE.

In an attempt to make out its Counterclaims against Ascend, MedMen conclusorily asserts that Ascend "exert[ed] untoward and potentially unlawful influence on Government Authorities," Ex. A ¶¶ 87, 95, improperly "communicated with Governmental Authorities, *id.* ¶ 102, and engaged in "a clandestine campaign of influence on government officials," *id.* ¶ 113.[3] To support those conclusory allegations, MedMen relies on two false allegations. *First*, MedMen alleges that Andrew Brown, Ascend New York's President, attended a December 8, 2021 fundraiser for Governor Kathy Hochul in Manhattan. *Id.* ¶¶ 72–74. But Mr. Brown was in Albany that entire week, as demonstrated by his *pro bono* appearances in federal court in *Morris v. Seward*, No. 16 Civ. 601 (N.D.N.Y.), each day between December 6 and December 9, 2021, as well as his hotel receipt reflecting that he did not check out of his Albany hotel until December 10, 2021 (and that he ate dinner at the hotel on December 8, 2021). Exs. C–E. *Second*, MedMen alleges that Ascend's Chief Executive Officer, Abner Kurtin, attended a meeting with "senior state officials" on December 10, 2021. Ex. A ¶¶ 70, 75. But Mr. Kurtin was in Florida on that day, as established by a receipt proving that he was in Pembroke Pines, Florida at 4 p.m. on the date in question. Denerstein Aff. Ex. F. Because this documentary evidence "utterly refutes plaintiff's factual

[3] MedMen's Counterclaims disparagingly refer to "potentially unlawful conduct." Ex. A at 15, ¶¶ 87, 95. But notwithstanding MedMen's vague allusions to "legal impropriety," *id.* ¶ 76, MedMen fails to identify any law that was allegedly violated. That is because there is none.

allegations," and because each of these Counterclaims is predicated on a fiction, Counts II, III, IV, and VI should be dismissed under CPLR 3211(a)(1). *See Goshen*, 98 N.Y.2d at 326.

In addition, CPLR 3024(b) empowers the Court to "strike any scandalous or prejudicial matter unnecessarily inserted into a pleading." That is of paramount importance because allegations in pleadings "are always in evidence for all the purposes of the trial of the action." *Braun v. Ahmed*, 127 A.D.2d 418, 422, 426 (2d Dep't 1987). Because MedMen's allegations concerning the Government Meetings are false, they are plainly unnecessary. And because they have already been used to smear Ascend (and Governor Hochul), they are clearly scandalous.[4] *Cf.* Wright & Miller, Fed. Prac. & Proc. § 1382 ("'scandalous' matter is that which improperly casts a derogatory light on someone"). Paragraphs 12-14, 69-76, 83-103, and 110-114 of the Counterclaims therefore "should be stricken." *Talbot v. Johnson Newspaper Corp.*, 124 A.D.2d 284, 285 (3d Dep't 1986); *see also*, *e.g.*, *Barter v. Barter*, 20 A.D.2d 727, 727 (1964) (striking allegation that husband was "suspected of mental illness"); *Wayte v. Bowker Chem. Co.*, 196 A.D. 665, 666 (2d Dep't 1921) (striking the "reproachful charge of cheating").

III. THE CONTRACT CLAIMS (COUNTS II-V) SHOULD BE DISMISSED BECAUSE MEDMEN HAS FAILED TO PLEAD ANY DAMAGES CAUSED BY ASCEND.

"To prevail on a breach of contract claim under New York law, a plaintiff must prove a contract; performance of the contract by one party; breach by the other party; *and damages*."

[4] *See* Ariel Zilber & Josh Kosman, *Hochul's office pushed for $75M sale of pot retailer to help campaign donor: lawsuit*, N.Y. POST (Jan. 24, 2022), https://nypost.com/2022/01/24/kathy-hochul-donor-got-state-approval-for-cannabis-merger-suit/. To be clear, there is nothing inherently scandalous about political contributions or involvement. Indeed, between 2017 and 2018, MedMen and its senior executives contributed at least $160,000 to New York State elected officials, including at least $140,000 to Governor Hochul's predecessor, Governor Cuomo. *See* Denerstein Aff. Ex. G-J; *see also* Sara Dom, *Medical marijuana lobbyists donated over $150K to Cuomo's campaign*, N.Y. POST (March 30, 2019), https://nypost.com/2019/03/30/medical-marijuana-lobbyists-donated-over-150k-to-cuomos-campaign/.

Aquino v. Alexander Cap., L.P., 2021 WL 3185533, at *14 (S.D.N.Y. July 27, 2021) (citations omitted) (emphasis added). "Without a clear demonstration of damages, there can be no claim for breach of contract." *Milan Music, Inc. v. Emmel Communications Booking, Inc.*, 37 A.D.3d 206 (1st Dep't 2007) (citations omitted). Moreover, "[t]o satisfy the damages element of a cause of action of breach of contract, the pleadings must allege that the breach directly and proximately caused the plaintiff's injury." *Weiss v. TD Waterhouse*, 45 A.D.3d 763, 764 (2d Dep't 2007); *see also*, *e.g.*, *Fam. Operating Corp. v. Young Cab Corp.*, 129 A.D.3d 1016, 1017 (2d Dep't 2015) ("To prevail on a cause of action alleging breach of contract, the plaintiff must demonstrate that it sustained actual damages as a natural and probable consequence of the defendant's breach" (citations omitted)).

No specific allegations of damages nor any theory of causation appear on the face of the Counterclaims. That is because MedMen plainly suffered no damages as a result of the alleged breaches, and the Counterclaims are nothing more than another attempt to escape MedMen's own obligations it accepted when it signed the Investment Agreement. "In the absence of allegations of fact showing damage," MedMen's contract claims must be dismissed. *Reade v. Sullivan*, 259 A.D. 229, 230 (1st Dep't 1940) (citations omitted); *Vista Food Exch., Inc. v. BenefitMall*, 138 A.D.3d 535, 536 (1st Dep't 2016); *Smith v. Chase Manhattan Bank, USA, N.A.*, 293 A.D.2d 598, 600 (2d Dep't 2002).

Counts II, III and IV. For its three breach of contract claims based on the alleged Government Meetings, MedMen advances two theories of injury. *First*, MedMen alleges that the Government Meetings "interfered with the closing" of the Transaction. Ex. A ¶¶ 89, 97, 103. Assuming *arguendo* that the Government Meetings actually happened (although they did not as demonstrated by the documentary evidence submitted herewith), such meetings are alleged to have

been undertaken with the intent "to *obtain* state approval." *Id.* ¶ 76 (emphasis added). Stated otherwise, MedMen appears to be arguing that Ascend interfered with the closing by attempting to ensure that closing conditions were satisfied. MedMen offers no explanation as to how Ascend's alleged efforts to ensure that governmental approvals were timely granted somehow impeded the Transaction. That is because the notion is plainly nonsensical. In order words, MedMen's defense to its own failure to use commercially reasonable efforts to close the Transaction is that Ascend used too much commercially reasonable effort to get the deal across the finish line. "It is axiomatic that damages for breach of contract are not recoverable where they were not actually caused by the breach—*i.e.*, where the transaction would have failed, and the damage would have been suffered, even if no breach occurred." *Pesa v. Yoma Dev. Grp., Inc.*, 18 N.Y.3d 527, 532 (2012). To the extent MedMen has been harmed by the Transaction's failure to close, the alleged Government Meetings are not the cause of any such damages.

Second, MedMen asserts that the supposed meetings between Ascend and New York state officials could somehow "affect the legal status of MedMen NY . . . as well as MedMen's operation in other states." Ex. A ¶¶ 89, 97, 103. But MedMen has not pleaded any theory as to how the alleged Government Meetings might do so. MedMen's suggestion that it might someday suffer some unspecified effects through an unidentified causal mechanism is nothing more than a "boilerplate allegation[]" that is "too vague and conclusory" to support that it has suffered any damages resulting from the breach of contract claims in Counts II, III and IV. *Parker Waichman LLP v. Squier, Knapp & Dunn Commc'ns, Inc.*, 138 A.D.3d 570, 570–71 (1st Dep't 2016) (citation omitted); *see also TSL (USA) Inc. v. OppenheimerFunds, Inc.*, 113 A.D.3d 410, 410 (1st Dep't 2014).

Count V. MedMen's breach of contract claim premised on Ascend's alleged public announcements suffers from the same fatal deficiency. As with the governmental interference claims, MedMen claims that Ascend's public statements somehow "interfered with the closing" and "could affect the legal status of MedMen NY" or "MedMen's operations in other states." Ex. A. ¶ 109. But not only does MedMen fail to plead what Ascend publicly stated, there are no factual allegations drawing any connection between Ascend's statements and the transaction's failure to close. Indeed, the only statement made before the Outside Date was on December 30, 2021, at which time Ascend allegedly announced that the transfer had been finalized, *id.* ¶¶ 60, 62, notwithstanding MedMen's (incorrect) allegation that the State had declined to approve the transaction weeks earlier, *see id.* ¶¶ 42–44. There is no connection alleged between that statement and the Transaction's failure to close. Moreover, MedMen alleges that it terminated the Investment Agreement on January 2, 2022, *id.* ¶ 64, *before* Ascend's allegedly improper public statements on January 3, 6 and 11, 2022, *id.* ¶ 63. Plainly, statements made *after* MedMen's supposed termination cannot have had any impact on the closing, nor could they have breached the Investment Agreement given MedMen's position that it had already terminated the Investment Agreement by then. And, as with the alleged Government Meetings, it is unclear how any of Ascend's unspecified public statements could possibly have affected MedMen's legal status in New York or elsewhere.

* * *

That MedMen brought these Counterclaims alleging that Ascend's efforts to close the Transaction somehow breached the Investment Agreement makes clear what this case is really about. Notwithstanding its complaints that Ascend "interfered with the closing," *id.* ¶¶ 89, 97, 103, 109, in a desperate bid to secure a more lucrative deal, MedMen is trying to avoid closing on

the terms that it agreed to in the Investment Agreement. As Ascend alleges in its Amended Complaint, filed contemporaneously herewith, MedMen did not perform in good faith under the contract or in determining whether the closing conditions were satisfied. But even taking MedMen's Counterclaims at face value, neither the purported Government Meetings intended "to obtain state approval" for the Transaction, *id.* ¶ 76, nor the accurate statement that such approval had been "received . . . from the Cannabis Control Board and the Office of Cannabis Management," *id.* ¶ 60, are alleged to have caused any damages to MedMen. Accordingly, MedMen's contract claims should be dismissed for failure to adequately allege an essential element of breach of contract. *Smith*, 293 A.D.2d at 600; *Basic Yield Alpha Fund*, 115 A.D.3d at 134 (dismissal appropriate where claimant "failed to assert a material allegation necessary to support the cause of action").

IV. MEDMEN HAS NOT ADEQUATELY ALLEGED THAT ASCEND BREACHED THE INVESTMENT AGREEMENT BY FAILING TO USE COMMERCIALLY REASONABLE EFFORTS.

Grasping for reasons to avoid its obligations under the Investment Agreement, MedMen seizes upon the implausible theory that the parties' agreement to use "commercially reasonable efforts" to secure the necessary government authorizations somehow placed a *ceiling* on the parties' level of efforts that precluded them from engaging in lobbying. Ex. A ¶¶ 69–76; 83–97. In relevant part, Section 5.8(a) of the Investment Agreement provides that "each party [t]hereto shall . . . use commercially reasonable efforts to obtain, or cause to be obtained, all Permits, consents, authorizations, orders and approvals from all Governmental Authorities that may be or become necessary for" the parties' "performance of [their] obligations pursuant to th[e] Agreement." Ex. B § 5.8(a). And Section 5.8(b) provides that the parties "shall use commercially reasonable efforts to give all notices to, and obtain all consents from, all third parties that are described in Section 3.3 of the Disclosure Schedules," including from the New York Department

of Health. *Id.* § 5.8(b). Because MedMen's interpretation of these provisions is as pretextual as it is nonsensical, Counts II and III of the Counterclaims should both be dismissed.

Under bedrock principles of New York law, contracts are "construed in accord with the parties' intent," and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing." *Greenfield v. PhillesRecords, Inc.*, 98 N.Y.2d 562, 569 (2002) (citation omitted). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Id.* Furthermore, contracts "should not be interpreted to produce a result that is absurd" or "contrary to the reasonable expectations of the parties." *Lipper Holdings, LLC v. Trident Holdings, LLC*, 1 A.D.3d 170, 171 (1st Dep't 2003) (citations omitted). MedMen nevertheless advocates for just such an improper interpretation of the Investment Agreement.

According to MedMen, the requirement that the parties use "commercially reasonable efforts" to obtain the needed government approvals serves as a waiver of their First Amendment rights to "petition the Government," *i.e.*, engaging in routine lobbying efforts. Notwithstanding MedMen's conspiratorial suggestion that Ascend "exert[ed] untoward and potentially unlawful influence," Ex. A ¶¶ 87, 95, all that MedMen incorrectly and falsely alleges is that Ascend executives attended a political fundraiser and met with government officials, *id.* ¶¶ 70–74. Even assuming *arguendo* that Ascend did so, which again, it did not, nothing in the Investment Agreement restricts the parties from using *only* commercial efforts, nor does the contract contain any language precluding *political* efforts to obtain necessary approvals. *Cf. Legal Aid Soc'y v. City of N.Y.*, 114 F. Supp. 2d 204, 226–27 (S.D.N.Y. 2000) (because "the waiver of a fundamental constitutional right must be undertaken voluntarily, knowingly and intelligently," it must be "explicitly waive[d]" rather than waived by implication").

It is only by misreading the plain text of the Investment Agreement—adding the word "only" and transforming "commercially reasonable" to "commercial"—that MedMen might marshal any support for its interpretation, and even then it is suspect. But MedMen cannot ask this Court to "rewrite a term of a contract by 'interpretation' when it is clear and unambiguous on its face." *Fiore v. Fiore*, 46 N.Y.2d 971, 973 (1979); *see also Skanska USA Bldg. v. Atl. Yards B2 Owner, LLC*, 31 N.Y.3d 1002, 1006 (2018) (contracts "should as a rule be enforced according to [their] terms" and "courts may not, through their interpretation of a contract, add or excise terms or distort the meaning of any particular words or phrases" (citations omitted)). Section 5.8(a) and 5.8(b)'s "commercially reasonable efforts" provisions obligate each party to take reasonable steps to obtain the necessary government approvals, without requiring—or prohibiting—additional steps that are not cost justified. *See, e.g.*, *Holland Loader Co., LLC v. FLSmidth A/S*, 313 F. Supp. 3d 447, 473 (S.D.N.Y. 2018) ("[C]ompliance with a 'commercially reasonable efforts' clause requires at the very least some conscious exertion to accomplish the agreed goal, but something less than a degree of efforts that jeopardizes one's business interests."). Those clauses serve the commonsense purpose of protecting the signatories from demands by their counterparties that they take unreasonable steps to obtain the requisite approvals, while simultaneously barring the parties from failing to take reasonable steps in an intentional effort to frustrate the purpose of the contract through an unreasonable failure to obtain such approvals.[5]

This ordinary-meaning interpretation of the phrase "commercially reasonable efforts" is consistent with that term's pervasive use in contracts. Indeed, similar "efforts" provisions are a "fixture" in commercial contracts, particularly ones in which the parties' obligations under the

[5] As set forth in Ascend's Amended Complaint, MedMen itself disregarded these provisions by failing to make commercially reasonable efforts to secure government approval for the Transaction.

contract are contingent on actions by a non-party, such as "a permit that a government agency must issue." Kenneth A. Adams, *Interpreting and Drafting Efforts Provisions: From Unreason to Reason*, 74 Bus. Law 677, 678 (2019). In context, these clauses place a floor, rather than a ceiling, on the required level of effort to perform. *See, e.g.*, *Fifteenth & Fifth LLC v. LG Park Slope LLC*, 199 A.D.3d 412 (1st Dep't 2021); *Shane Campbell Gallery, Inc. v. Frieze Events, Inc.*, 441 F. Supp. 3d 1, 4 (S.D.N.Y. 2020).

The broader context of the Investment Agreement further establishes that the parties did not intend the obligation to undertake "commercially reasonable efforts" to limit the parties' efforts. Neither Section 5.8(a) nor 5.8(b) evinces any concern over potential political contacts. To the contrary, Section 5.8(a) is aimed at preventing holdouts: it repeats that both parties "shall cooperate fully" to acquire—and shall not "take any action that will have the effect of delaying, impairing or impeding the receipt of"—the government authorizations. Ex. B § 5.8(a). And the "commercially reasonable efforts" terminology is not restricted to those provisions alone. The phrase "commercially reasonable efforts" is used twelve times throughout the Investment Agreement, yet there is not a single instance in which it is used in a provision directed at government influence. In fact, reading that term to prohibit "political efforts" would render the Investment Agreement unintelligible. *See, e.g.*, *id.* § 5.1(a) (companies shall use "commercially reasonable efforts" to maintain current corporate structure). Because phrases "should presumptively be given the same meaning" when used in different sections of a contract, Sections 5.8(a) and 5.8(b) cannot be reasonably read to preclude communication with government officials. *State v. R.J. Reynolds Tobacco Co.*, 304 A.D.2d 379, 380 (1st Dep't 2003).

Sections 5.8(a) and 5.8(b) are not reasonably susceptible to the meaning that the Counterclaims use to support MedMen's allegations. Accordingly, Counts II and III should be dismissed. *150 Broadway*, 784 N.Y.S.2d at 65.

V. COUNT IV SHOULD BE DISMISSED BECAUSE MEDMEN HAS FAILED TO ALLEGE A BREACH OF THE INVESTMENT AGREEMENT.

MedMen's breach of contract claim based on Section 5.8(e) of the Investment Agreement fares no better. That provision requires both MedMen and Ascend to give prior notice to the other side of all "meetings," "discussions," "appearances," or "other communications" with any "Governmental Authority or the staff or regulators of any Governmental Authority, *in connection with the transactions contemplated*" by the Agreement. Ex. B § 5.8(e) (emphasis added). But the Counterclaims fall short of providing sufficient factual allegations to support a breach of Section 5.8(e) because there are no allegations that two supposed Government Meetings described in the Counterclaims were "in connection with" the Transaction.

While MedMen alleges that the Government Meetings were meant to "influence" the "state approval process," Ex. A ¶ 75, it does not plead that the Transaction was ever discussed at either Government Meeting. The Counterclaims allege that Mr. Brown attended a fundraiser on December 8 that was "specifically targeted" at the host law firm's "cannabis clients," *id.* ¶¶ 71–74, but there is no assertion that the event featured any discussion of the Transaction, or indeed that anyone from Ascend actually spoke with any government officials at that fundraiser. Likewise, the Counterclaims mention a meeting that supposedly occurred on December 10 between Ascend's CEO, Mr. Kurtin, and several of Governor Hochul's staff members, including the Special Advisor on Pandemic Relief, *id*. ¶ 70, but, again, the Counterclaims fail to specify what the topic of the meeting was. Accordingly, the Counterclaims do not plead that Ascend had meetings with a Governmental Authority "in connection with" the Transaction. Count IV should

therefore be dismissed for failing to allege a breach of Section 5.8(e). *See Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017) ("Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim" (citations omitted)).[6]

VI. THE IMPLIED COVENANT CLAIM (COUNT VI) SHOULD BE DISMISSED AS DUPLICATIVE OF MEDMEN'S CONTRACT CLAIMS.

"Ordinarily, a breach of the duty of good faith and fair dealing is considered a breach of contract" and "[r]aising both claims in a single complaint is redundant." *ARS Kabirwala, LP v. El Paso Kabirwala Cayman Co.*, 2017 WL 3396422, at *4 (S.D.N.Y. Aug. 8, 2017) (citations and alterations omitted). That is particularly true here because MedMen's claim for breach of the implied covenant of good faith and fair dealing simply restates its contract claims. And, like the contract claims, it should be dismissed. *See 320 W. 115 Realty LLC v. All Bldg. Constr. Corp.*, 194 A.D.3d 511, 512 (1st Dep't 2021) (affirming dismissal of implied covenant claim that "relies on the same facts" and "seek[s] the exact same damages" as a contract claim).

To state a cause of action for breach of an implied covenant of good faith and fair dealing, MedMen must allege that Ascend "exercise[d] a contractual right as part of a scheme to realize gains that the contract implicitly denies or to deprive [MedMen] of the fruit or benefit of [their] bargain." *Elmhurst Dairy, Inc. v. Bartlett Dairy, Inc.*, 97 A.D.3d 781, 784 (2d Dep't 2012) (citation omitted); *see also Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Com.*, 265 A.D.2d 513, 514 (2d Dep't 1999) (requiring allegations "that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff"). But the only specific allegation underlying MedMen's implied covenant claim is that "Ascend used a clandestine

[6] Indeed, the only specific allegations in the Counterclaims of *ex parte* interactions with Governmental Authorities in connection with the Transaction involve communications between *MedMen* and the OCM. Twice, MedMen admits that it discussed the Transaction with the OCM's General Counsel, Richard Zahnleuter. Ex. A ¶¶ 48, 58.

campaign of influence on government officials," Ex. A ¶ 113, which is also what MedMen claims breached Section 5.8 of the Investment Agreement, *id.* ¶¶ 87, 95, 102. That same conduct cannot support both *breach* of contract claims and an implied covenant claim predicated on Ascend "*exercis*[*ing*] a contractual right." *Elmhurst Dairy*, 97 A.D.3d at 784 (emphasis added). Because MedMen's breach of good faith and fair dealing claim is instead entirely duplicative of its breach of contract claims, it must be dismissed. Indeed, implied covenant claims are "routinely dismissed as redundant" under such circumstances. *ERE LLP v. Spanierman Gallery, LLC*, 94 A.D.3d 492, 493 (1st Dep't. 2012); *see also*, *e.g.*, *Amcan Holdings, Inc. v. Canadian Imperial Bank of Com.*, 70 A.D.3d 423, 425–26 (1st Dep't 2010); *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 319–20 (1995).[7]

[7] Moreover, MedMen alleges that Government Meetings were intended "to obtain state approval" for the parties' transaction. Ex. A ¶ 76. Taking that allegation as true, there was no attempt "to deprive MedMen of its benefits under the Agreement." *Id.* ¶ 112. Rather, the alleged meetings were intended to ensure that both parties *obtained* "the fruit or benefit of [their] bargain." *Elmhurst Dairy*, 97 A.D.3d at 784. That is the very opposite of a breach of the implied duty of good faith and fair dealing. As with MedMen's other Counterclaims, there is simply no basis in the law for its novel theory that lobbying efforts to make the Transaction's closing more likely somehow violated Ascend's duty of good faith and fair dealing.

CONCLUSION

For the foregoing reasons, Defendants' Counterclaims should be dismissed with prejudice.

Dated: New York, New York
February 14, 2022

Respectfully submitted,

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Mylan L. Denerstein, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court because it contains 6,931 words, excluding the parts of the memorandum exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: February 14, 2022

/s/ Mylan L. Denerstein
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