NO. _____

In the Supreme Court of the United States

BUSINESS EXPOSURE REDUCTION GROUP (BERG) ASSOCIATES, LLC,

Petitioner,

v.

PERSHING SQUARE CAPITAL MANAGEMENT, L.P.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the courts below deviated from and disregarded this Court's holding in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), by granting dismissal with prejudice under Rule 12(b)(6) based on inferences of the motivation and the state of mind of the defendant, findings of fact that occurred in the absence of any record other than the amended complaint.

CORPORATE DISCLOSURE STATEMENT

Petitioner Business Exposure Reduction Group Associates, LLC is a privately-owned entity. It has no parent corporation and there is no publicly held company that owns 10% or more of their stock.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Second Circuit

No. 21-1980-cv

Business Exposure Reduction Group (BERG) Associates, LLC, *Plaintiff-Appellant,* v. Pershing Square Capital Management, L.P., *Defendant-Appellee.*

Date of Final Opinion: March 30, 2022

U.S. District Court Southern District of New York

No. 20 Civ. 10053

Business Exposure Reduction Group (BERG) Associates, LLC, *Plaintiff,* v. Pershing Square Capital Management, L.P., *Defendant.*

Date of Final Opinion and Order: July 16, 2021

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OPINIONS AND ORDERS

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OPINIONS BELOW

The ruling of the United States Court of Appeals for the Second Circuit dated March 30, 2022 affirming the decision of the District Court is reproduced at App.1a.

The decision and order of the United States District Court for the Southern District of New York dismissing the plaintiff's complaint dated July 16, 2021 is reproduced at App.8a.

These opinions were not designated for publication.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on March 30, 2022. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254.

RULES OF COURT INVOLVED

The relevant provision of the Federal Rules of Civil Procedure is Fed. R. Civ. P. 12(b)(6).

> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (6) failure to state a claim upon which relief can be granted;

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 (diversity jurisdiction) in that the dispute is between petitioner, a Florida entity, and respondent, a Delaware corporation. The record consists entirely of the Amended Complaint that was dismissed at the threshold in an opinion heavily grounded in the motion court's factual inferences; on this same basis, the Court of Appeals affirmed in a summary opinion.

A. Summary of Allegations in the Amended Complaint

Petitioner Business Exposure Reduction Group Associates, LLC ("BERG") provided investigative services to respondent Pershing Square Capital Management L.P. ("Pershing"), a hedge fund. The purpose of

the investigation was to provide information as to potential criminal activity by Herbalife Nutrition Ltd. ("Herbalife") whose stock Pershing had shorted. App. 38a-40a. Pershing hired BERG to develop a case of criminal activity against Herbalife which, if revealed to the market, would cause a decline in Herbalife's stock price, enabling Pershing to benefit from its short position. App.40a.

For its services Pershing agreed BERG would be paid an hourly rate of $200, which would be retroactively adjusted to $750/hour in the event that "the case developed by BERG Associates is settled or resolved in a manner that Pershing Square determines is financially beneficial" App.40a-41a. BERG ultimately billed more than 5,600 hours of time in the investigation. App.46a.

BERG developed an extensive case of criminal conduct against Herbalife, App.42a-43a, that was presented publicly by Pershing's principal William Ackman on July 22, 2014 at an event headed "The Big Lie" using materials obtained from BERG's investigation App.41a. Pershing also disclosed this information to the media. App.42a. Following the public disclosures, Herbalife stock plummeted, from $80.81 per share when BERG was engaged in December 2013, to $33.25 per share on March 12, 2015 when BERG was asked to "stand down," or cease developing its investigative case. App.43a.

At that time BERG recommended that Pershing close its short position and book a financial benefit of $107,010,000 generated from the 2,250,000 Herbalife shares held by Pershing. App.43a. Pershing chose not to close its stock position in Herbalife at a time when doing so would have been financially beneficial and

it eventually lost money on the Herbalife transaction. App.43a. The complaint detailed the benefit to Pershing that flowed from BERG's work. App.44a-45a.

Despite the financial benefit brought to Pershing by BERG's investigation, BERG was paid for its accumulated hours at the initial rate of $200 per hour. Pershing refused to pay BERG the higher success fee of $750 per hour resulting in a loss to BERG of a minimum of $3,086,875.00. App.46a. BERG brought the diversity proceeding alleging breach of contract.

B. The Decisions Below

District Court Judge Paul A. Engelmayer dismissed the Amended Complaint holding that it did not "plausibly allege" that Pershing arbitrarily concluded that there was no financial gain from BERG's work. Acting under *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 392 (1995), the district court reasoned that BERG could collect only if Pershing acted arbitrarily in concluding that it gained no benefit from BERG's work.

Reading into the state of mind of Pershing, Judge Englemayer concluded:

> [T]here would not have been an obvious reason for Pershing to make such a determination [as to whether it received a financial benefit] at a point when its gains were on paper only and at which it had not elected to exit its position to lock in those gains (or losses), . . .

(App.27a)

In other words, without any factual record, the district judge dismissed a complaint on *Twombly*

"plausibility" grounds by making an assumption as to Pershing's state of mind, *i.e.*, that Pershing "would not have [] an obvious reason" to have made any decision as to whether it received a financial benefit from BERG's investigation into Herbalife. App.27a. The trial judge had no evidence before him as to any motivation of Pershing so as to support such inferences. Adding to the weight of such speculation, the district court indulged in a far-reaching interpretative analysis of the parties' likely intent in conveying rights to BERG, in the complete absence of declarations, testimony or any discovery. App.20a-21a,23a. All of this was speculation and inference on a Rule 12(b)(6) motion to dismiss.

The district court (and the court of appeals in its affirmance) also committed plain error when they concluded the complaint did not allege that Pershing had made any decision as to whether BERG's services were financially beneficial. In reaching this conclusion, the district court ignored entirely the provision in the complaint that "*Pershing believed* that the investigative case being developed by BERG *was beneficial* and on July 22, 2014, the public presentation of 'The Big Lie' was made by Pershing and [] Ackman, using materials obtained from BERG as a result of BERG's investigation." App.41a [emphasis added]. Such allegations more than satisfy this Court's rules that the assertion be plausibly pled. The court of appeals and the district court simply ignored and misapplied *Bell Atl. Corp. v. Twombly*.

On this same scant record, the Court of Appeals affirmed, again by reading into the corporate state of mind of respondent, holding "there is nothing irrational about a hedge fund choosing to determine benefit to its financial standing only after it has closed out a

short position." App.5a. As did the district court, the court of appeals dismissed a well-pled complaint by concluding as to the state of mind of the respondent, well outside of the court's powers under Rule 12(b)(6).

Due process was violated by these extraordinary holdings that deprived petitioner of judicial redress. The holdings below find no support in this Court's jurisprudence as to the standard for dismissal under Rule 12(b)(6) and directly violate its teaching in *Bell Atl. Corp. v. Twombly* that a complaint need plead "only enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570. Dismissal at the threshold was based entirely on the lower courts' supposition as to the motivation and state of mind of the respondent, well outside the limits the Court has recognized govern a Rule 12(b)(6) motion.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS DEVIATED SUBSTANTIALLY FROM THIS COURT'S CONSTRUCTION IN *BELL ATL. CORP. V. TWOMBLY* AS TO THE LIMITS OF THE COURT'S POWER ON A RULE 12(B)(6) MOTION TO DISMISS.

In *Twombly* this Court held that in federal practice there is no rigid pleading standard but, rather, the complaint must state "only enough facts to state a claim . . . that is plausible on its face." 550 U.S. at 570. The lower courts below disregarded this standard. Instead, they impressed upon *Twombly* their own broader scope of review consisting of inferences drawn from the complaint, without any evidentiary record, namely the courts' belief that Pershing had no reason to have made a decision as to whether it had benefitted from BERG's investigations and, hence, could not have been acting arbitrarily when it refused to pay the success fee. In effect, the lower courts dismissed at the threshold based on their view of "state of mind" issues, depriving BERG of its opportunity for judicial redress and departing significantly from the limits this Court recognized in *Twombly*.

The result is to undermine this Court's careful directives that a motion to dismiss may not be granted based on inference derived from the trial or appellate court's belief or disbelief in the *bona fides* of the allegations. *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes*, 416 U.S. 232, 236

(1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely"). No decision of this Court permits a trial or appeals court to evaluate the parties' motivational factors at the threshold in the absence of a factual record. Yet the courts below did just that.

Twombly did not usher in an era of subjective judicial fact-determination on a motion to dismiss without any evidentiary record. To the contrary, under *Twombly* a plaintiff need only "allege facts" that, taken as true, are "suggestive of illegal conduct." 550 U.S., at 564, n. 8. In *Twombly*, the pleading was defective because the alleged anti-trust conduct was "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554. The pleading deficit in *Twombly* arose from a "naked assertion of conspiracy . . . , but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557.

Here "factual enhancement" *was* presented in the complaint but ignored by the lower courts. BERG alleged that "Pershing believed that the investigative case being developed by BERG was beneficial . . . " (App.41a), that its exposure of Herbalife's criminal activity resulted in a drop in Herbalife's stock price that reduced Pershing's losses by $107 million, that such benefit arose *after* Pershing published BERG's information (App.41a-42a) and that Pershing rejected BERG's advice to close out the position to realize the benefit (*id.* at ¶¶ 35-37). Under *Twombly,* this set of facts presents a plausible claim that Pershing arbitrarily rejected the opportunity to benefit financially

from BERG's activities; these allegations are not "a formulaic recitation of the elements of a cause of action." *Cf.*, *Twombly*, 550 U.S. at 555.

By ignoring these well-pled facts the lower courts departed from *Twombly's* teaching that a court may not impress upon the complaint its own view of the likelihood of the facts being true: "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable". *Id.* at 556. The factual assertions, as pled by BERG, certainly meet the Court's test of "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The courts below forged a new direction in 12(b)(6) analysis that if allowed to stand will empower trial courts to dismiss well-pled actions based on the courts' inference of the defendant's motivation or state of mind. Such reasoning breaches considerations of basic due process as it deprives a plaintiff of judicial redress where a plaintiff has pled a reasonable factual basis to support the complaint. *See e.g. Ashcroft v. Iqbal*, *supra.* Certiorari should be granted to prevent this departure from *Twombly's* well-reasoned restraint on a district court's power to dismiss, a departure that is reflected in the Second Circuit's affirmance and the district judge's holding, below.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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