

Ascend Wellness Holdings, Inc. v MedMen NY, Inc.

2023 NY Slip Op 32872(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 650220/2022

Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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 ASCEND WELLNESS HOLDINGS, INC. and AWH NEW
 YORK, LLC,

Plaintiff,

- v -

MEDMEN NY, INC., MM ENTERPRISES USA, LLC,
 PROJECT COMPASSION NY, LLC, and PROJECT
 COMPASSION CAPITAL, LLC,

Defendants.

INDEX NO. 650220/2022

MOTION DATE 01/20/2023

MOTION SEQ. NO. 013

**DECISION + ORDER ON
 MOTION**

-----X
 HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 013) 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 200

were read on this motion to/for

DISMISS

Plaintiffs-counterclaim defendants Ascend Wellness Holdings, Inc and AWH New York, LLC (together, Ascend) bring this action, as amended on November 21, 2022, against defendants-counterclaim plaintiffs MedMen NY, Inc., MM Enterprises USA, LLC, Project Compassion NY, LLC, and Project Compassion Capital, LLC (collectively, MedMen), asserting claims for breach of contract, anticipatory breach of contract, and breach of the implied covenant of good faith and fair dealing (NYSCEF # 131 – Compl.). On December 21, 2022, MedMen responded with its Verified Amended Counterclaims, Answer, and Affirmative Defenses, which sets forth ten counterclaims for, *inter alia*, declaratory relief, breach of contract, and breach of good faith and fair dealing (NYSCEF # 153 – the Counterclaims or SACC). Presently before the court is Ascend’s motion to dismiss the Counterclaims pursuant to CPLR 3211(a)(1), (a)(7), and (g) (NYSCEF # 155). For the following reasons, Ascend’s motion is granted in part and denied in part.

BACKGROUND¹

This action arises from the breakdown of a proposed sale by MedMen of its licensed New York cannabis retailer, MedMen NY (*See* SACC ¶¶ 44-45, 49; Compl. ¶¶ 14-15). In or around February 2021, following a sales process, MedMen agreed to

¹ The following facts are derived from the allegations in the Second Amended Counterclaims (SACC), as well as its accompanying exhibits and documents incorporated by reference. They are accepted as true for purposes of this motion.

sell its ownership and control in MedMen NY to Ascend in exchange for a multi-million-dollar investment by Ascend (the Transaction) (SACC ¶ 3, 50; Compl. ¶ 38; NYSCEF # 159 – Investment Agreement §§ 2.1, 2.3, 7.2(n)). In connection with the Transaction, the parties executed various contracts, including, as relevant here, the Investment Agreement among MedMen NY, Inc. and MM Enterprises USA, LLC, AWH New York, LLC, and Ascend Wellness Holdings, LLC, dated as of February 25, 2021 (the Investment Agreement) (SACC ¶¶ 52-57).

Relevant Obligations and Covenants Under the Investment Agreement

The Investment Agreement provided for various closing conditions necessary to consummate the Transaction (SACC ¶¶ 52-57). Chief among them was an obligation that Ascend and MedMen “receive[] all consents, authorizations, orders and approvals from the Government Authorities referred to in” Section 3.3 of the Investment Agreement “in form and substance reasonably satisfactory” to each party (SACC ¶¶ 53-54; Investment Agreement §§ 3.3[b], 7.1[b]). The closing conditions further provided that MedMen’s obligation to close the transaction was subject to “All approvals, consents and waivers that are listed on Section 4.2 of the Disclosure Schedules shall have been received, and executed counterparts thereof shall have been delivered to the Company at or prior to the Closing” (SACC ¶ 56; Investment Agreement § 7.3(d)). The requisite government consent required by the Investment Agreement was approval of the Transaction from the “New York Department of Health” (NYDH) (SACC ¶¶ 54, 56).²

Upon satisfaction of all closing conditions, including any government approvals, the parties were to close the Transaction within five days (Investment Agreement § 2.2(a)). But if “any of the [closing] conditions set forth in Section 7.1 shall not have been fulfilled by the Outside Date [December 31, 2021],” either party could terminate the Transaction (SACC ¶ 57; Investment Agreement § 9.1(d)). Similarly, MedMen had the right to terminate the Transaction if it was not in material breach of the Investment Agreement, and the closing conditions were not fulfilled by the Outside Date (SACC ¶ 57; Investment Agreement § 9.1(c)(ii)).

In addition to the foregoing terms, the Investment Agreement set forth various covenants to which the parties agreed. Certain of those covenants related to the parties’ government outreach, as well as public announcements concerning the Transaction (Investment Agreement Art. V). For example, under Section 5.8(a), the parties were to submit a request to NYDH for approval of the Transaction and use “commercially reasonable efforts to obtain, or cause to be obtained” NDHY’s approval (Investment Agreement § 5.8(a)). Further, under Section 5.8(e), the parties agreed to disclose “[a]ll analyses, appearances, meetings, discussions, presentations,

² The parties agree that NYDH’s approval was necessary because, at the time of the Transaction, MedMen NY’s cannabis license was governed by the Compassionate Care Act of 2014, which prohibited transfer of the license itself and instead required prior written approval from NYDH (SACC ¶ 51, citing 10 NYCRR §§ 1004.8[b], 1004.10[b][5]; Compl. ¶ 40).

memoranda, briefs, filings, arguments, proposals and other communications [related to the Transaction] made by or on behalf of either party before any Governmental Authority or the staff or regulators of any Governmental Authority . . . in advance of any filing, submission or attendance” (*id.* § 5.8(e)). Finally, Section 5.12 prohibited the parties from making “any public announcements in respect of this Agreement or the transactions contemplated hereby or otherwise communicate with any news media without the prior written consent of the other party . . .” (*id.* § 5.12).

MedMen’s NYDH Application, the Disputed CCB Approval Process, and MedMen’s Attempted Termination of the Agreement

MedMen submitted two applications to NYDH for approval on January 22, 2021, and March 21, 2021, respectively (SACC ¶¶ 58-60). But ten days after MedMen’s second application, New York enacted the Marijuana Regulation & Taxation Act (MRTA) (*id.* ¶ 63). Notably, MRTA changed how cannabis licenses are regulated in the state and created the Cannabis Control Board (CCB) and Office of Cannabis Management (OCM) (*id.* ¶¶ 63-66). According to MedMen, under MRTA, CCB has “ultimate decision-making authority over the granting, amendment, and revocation of cannabis licenses,” while OCM only oversees “various administrative and executive functions” (*id.* ¶¶ 65-66).

After the enactment of MRTA, Ascend and MedMen worked together, as well as with a public strategy firm, regulatory counsel, and government relations professionals, to advance the government approval process (SACC ¶¶ 67-70). Ascend eventually engaged Greenberg Traurig as a lobbying firm at the end of summer 2021, and, following discussions with MedMen, it sent supplemental material to NYDH in September 2021 (*id.* ¶¶ 70-71). MedMen alleges that, without its knowledge, Ascend then retained another lobbying firm, Dickinson & Avella, to assist with Ascend’s lobbying efforts (*id.* ¶ 71). MedMen contends that, after CCB did not address the parties’ application during its first official meeting, Ascend directed Greenberg Traurig and Dickinson & Avella to arrange for private fundraising events for Governor Kathy Hochul (*see id.* ¶¶ 72-76, 114).³ Despite Ascend’s purported efforts, CCB did not address the application for approval during its second meeting held on November 3, 2021 (*id.* ¶ 75).

On December 9, 2021, CCB announced that it would hold its final board meeting of the year on December 16, 2021 (SACC ¶ 77). This time the agenda for this meeting included the following topic: “Consideration of Medical Cannabis Program Items” (*id.*) MedMen avers that CCB included this agenda item following

³ MedMen cites to an article reporting that one such fundraiser purportedly involved “discussions about state business,” although there is no indication that there were discussions specifically related to the Transaction (SACC ¶ 73 & n.5). MedMen further avers, mostly upon information and belief, that one of these fundraisers was attended by representatives of Ascend, and that Ascend donated \$20,000 to Governor Hochul (*id.* ¶¶ 74, 114).

Ascend's purported influence campaign on government officials (*see id.* ¶¶ 17, 81-84, 113-118, 177; NYSCEF # 188 – Record Aff. ¶¶ 13-14; NYSCEF # 189 at p. 4). After this latest CCB announcement, Ascend allegedly began communicating to MedMen and others that the transaction would close, and it provided MedMen with a draft press release regarding the anticipated approval of the Transaction by NYDH (SACC ¶¶ 79-80).

On December 16, 2021, CCB announced Resolution No. 2021-09, titled “RESOLUTION TO CONDITIONALLY APPROVE THE CHANGE IN OWNERSHIP OF REGISTERED ORGANIZATION MEDMEN NY, INC” (the Resolution) (SACC ¶ 85; NYSCEF # 125). Pursuant to the Resolution, CCB “approve[d] by majority vote . . . the change of ownership of MedMen NY, Inc, contingent on the review of the proposed investment by the Office staff for compliance with the Cannabis Law, its corresponding regulations, and any other contingencies and conditions as determined by the Board and Office” (SACC ¶ 85). In MedMen’s view, the Resolution did not constitute final approval of the transaction as contemplated by the Investment Agreement (*id.* ¶¶ 86-87). MedMen communicated those same concerns to Ascend (*See id.* ¶¶ 88-90).

On December 23, 2021, Richard Zahnleuter, General Counsel for OCM, emailed MedMen to request a call regarding the status of the Investment Agreement (SACC ¶ 91). Zahnleuter communicated to MedMen that OCM had only recently begun to consider MedMen’s application, and its review might take thirty to sixty days to complete (*id.* ¶¶ 91-93). Zahnleuter also purportedly inquired whether the parties would consider an extension of the Outside Date under the Investment Agreement (*id.* ¶¶ 93-94). Despite these communications, however, Zahnleuter wrote to representatives of both Ascend and MedMen on December 29, 2021 (the December 29 Email), to

confirm that [CCB], effective December 16, 2021, approved of the referenced change in ownership of MedMen NY, Inc. While such approval constitutes final approval for the purposes of closing the transaction and enacting the transfer of ownership, 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.

(SACC ¶ 95; NYSCEF # 129). Zahnleuter further noted that “[t]he [OCM] will continue to hold MedMen NY, Inc., accountable for any acts or omissions constituting violations of such provisions of law. . . including but not limited to, non-compliance with the prior written approval provisions of Section 1004.10(b)(5)” (*id.*) MedMen contends that Zahnleuter’s email was without authority to speak for the CCB or interpret or declare the effect of the Resolution (SACC ¶¶ 97-101). MedMen claims that Zahnleuter later admitted he was “pressured” to send his email but did not indicate who pressured him (*id.* ¶¶ 102-103).

Upon receipt of the December 29 Email, Ascend informed MedMen that it intended to issue a press release indicating that the parties had received “final approval” from CCB and OCM (SACC ¶ 104). Although MedMen declined to consent to this statement, Ascend published the press release on December 30, 2021 (*id.* ¶ 106).⁴

On January 2, 2022, MedMen informed Ascend that it was terminating the Investment Agreement pursuant to Section 9.1(d) (SACC ¶ 108). The next day Ascend responded, stating that the December 29 Email confirmed that the Resolution constituted the requisite “final approval” necessary to satisfy the Investment Agreement’s closing conditions and consummate the Transaction (SACC ¶ 109). MedMen replied on January 5, 2022, reiterating its position that it was terminating the Investment Agreement because neither the Resolution nor the December 29 Email constituted government approval that was “in form and substance reasonably satisfactory” to MedMen (*id.* ¶¶ 110-111, 129; NYSCEF # 131). MedMen also asserted additional grounds for termination, including material breaches of Sections 5.8(e) and 5.12 of the Investment Agreement (*id.* ¶ 110). The following week, Ascend commenced this action (NYSCEF # 2).

The Parties’ Settlement Efforts, and Ascend’s Abandonment of the Transaction

With this lawsuit pending, the parties engaged in settlement discussions (SACC ¶¶ 119-120). Eventually, the parties executed a “Conditional Term Sheet Subject to FRE 408 and CPLR 4547,” dated May 10, 2022 (*id.* ¶ 119; NYSCEF # 160 – Term Sheet). The parties intended the Term Sheet “to set forth [their] material rights and obligations” in connection with “the proposed settlement” of Ascend’s lawsuit (Term Sheet at 1). Those terms included, among others, a (1) provision that the parties close the Transaction “[w]ithin thirty (30) days of executing the Settlement Agreement and Transactional Agreements,” as well as (2) an agreement by Ascend to “pay or cause the payment of fifteen million (\$15,000,000)” to MedMen “[i]n consideration for the Settlement” (*id.* at 2-3). But the Term Sheet clarified that “[t]here will be other terms, including standard and customary terms, included in a definitive settlement agreement . . . as well as new or amended transaction documents . . . as necessary to effectuate the Settlement and close the Transaction” (*id.* at 1). The parties agreed to “use their best efforts to execute the Settlement Agreement based on the terms herein and additional customary terms within ten (10) days of execution” (*id.*).

MedMen alleges that it circulated draft settlement documents and an amendment to the Investment Agreement for Ascend to finalize and execute (SACC ¶ 121). But Ascend then purportedly refused to engage with MedMen and instead

⁴ Ascend made additional statements concerning MedMen, the Investment Agreement, and the Transaction on January 3, January 6, January 11, all purportedly without MedMen’s consent (SACC ¶ 107; *see also* NYSCEF # 186-189).

“wage[d] a campaign of obfuscation and delay” by requesting “due diligence” information from MedMen in an apparent effort to delay performance (*id.* ¶¶ 121-122). For its part, Ascend claims that there existed a “material change” in MedMen’s condition, which MedMen retorts was “pretext” to avoid closing the Transaction (*id.* ¶ 122; *see also* Compl. ¶¶ 83-87). It also identifies documentary evidence that indicates that it was Ascend—not MedMen—who provided the draft documents that the parties then negotiated and revised between May 13 through May 25 (*see* NYSCEF # 161-167)

The Second Amended Counterclaims

Ascend initially commenced this action on January 13, 2022 (NYSCEF # 2). Upon stipulation of the parties, Ascend filed its verified second amended complaint (Complaint) on November 28, 2022 (NYSCEF # 132; NYSCEF # 147). On December 21, 2022, MedMen filed the Counterclaims. In total, the Counterclaims assert ten causes of action, including (1) four claims for declaratory relief as to certain rights, obligations, and conditions set forth in the Investment Agreement (Counts I-III) and Term Sheet (Count IV), (2) three claims for breach of contract related to Sections 5.8(e) and 5.12 of the Investment Agreement (Counts V-VII), (3) one claim for breach of contract related to the Term Sheet (Count VIII), and (4) two claims for breach of the implied covenant of good faith and fair dealing arising out of the Investment Agreement (Count IX) and the Term Sheet (Count X), respectively (SACC ¶¶ 124-182). Ascend now moves to dismiss. The court held oral argument on Ascend’s motion on July 18, 2023.

LEGAL STANDARDS

CPLR 3211(a) provides for various grounds under which a party may move for judgment dismissing one or more causes of action, including when a pleading “fails to state a cause of action” (CPLR 3211 [a] [7]) or “a defense is founded upon documentary evidence” (CPLR 3211 [a] [1]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the court “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the non-movant] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory” (*Whitebox Concentrated Convertible Arb. Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation omitted]; *accord Pavich v Pavich*, 189 AD3d 548, 549 [1st Dept 2020]).

“[W]hether a plaintiff . . . can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss” (*Phillips S. Beach LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008], *lv denied* 12 NY3d 713 [2009]). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” (*Morgenthau & Latham v Bank of*

New York Company, Inc., 305 AD2d 74, 78 [1st Dept 2003] [internal citation and quotation omitted]). That said, dismissal based on documentary evidence under 3211(a)(1) is warranted “only when it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it” (*Acquista v New York Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001]), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Finally, if the moving party “demonstrate[s] that the action, claim, cross claim or counterclaim subject to [its] motion is an action involving public petition and participation” (i.e., as further discussed below, an anti-SLAPP lawsuit), then the court shall grant the motion to dismiss “unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law” (CPLR 3211 [g]). To establish a “substantial basis in law,” the opposing party must offer “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact” (*Smartmatic USA Corp. v Fox Corp.*, 213 AD3d 512, 512 [1st Dept 2023]).

DISCUSSION

I. Applicability of New York’s Anti-SLAPP Statute

“[A] finding that an action is a SLAPP suit entails serious consequences to the plaintiff: a heightened standard of proof is imposed upon the plaintiff to avoid dismissal of the action” (*Guerrero v Carva*, 10 AD3d 105, 116 [1st Dept 2004]; *Caesars Entertainment Operating Co., Inc. v Appaloosa Inv. Ltd. P’ship I*, 48 Misc3d 1212[A], at *5 [Sup Ct, NY County, July 20, 2015]). And if the “action is one for defamation, an actual malice standard is imposed,” which “plaintiff shall [] establish by clear and convincing evidence” (*Guerrero*, 10 AD3d at 116; NY Civ Rights Law § 76-a [2]). A party that is successful in securing a dismissal of a case as an anti-SLAPP lawsuit will be entitled to seek reimbursement of costs and attorneys’ fees,” and possibly compensatory and punitive damages upon “additional demonstration[s]” (NY Civ Rights Law § 70-a [1] [a]). Given these implications, the CPLR puts the onus on the moving party to demonstrate that the alleged SLAPP lawsuit or cause of action is one that involves “public petition and participation” (see CPLR 3211 [g]). The anti-SLAPP law will be “strictly construed” (see *Carey v Carey*, 74 Misc 3d 1214[A], at *4 [Sup Ct, NY County, Feb. 15, 2022], citing *315 W. 103 Enters. v Robbins*, 171 AD3d 466, 467 [1st Dept 2019]).

In bringing its motion, Ascend contends that MedMen’s Counterclaims fall within the ambit of New York’s anti-SLAPP statute and should be subject to the heightened pleading standard set forth under CPLR 3211(g) (NYSCEF # 156 – MOL at 10, citing NY Civ Rights Law § 76-a [1] [a] [2]). Ascend primarily argues the Counterclaims target issues of public interest because, *inter alia*, the “core of this litigation concerns MedMen’s application to transfer to Ascend a government-

granted cannabis license . . . and the critical question of whether state regulators approved the application” (*id.* at 12). In opposition, MedMen responds that the Counterclaims relate to a dispute concerning a purely private matter, namely the parties’ respective contractual rights under the Investment Agreement and Term Sheet (NYSCEF # 176 – Op. at 11-13). Even if the subject of the parties’ dispute may be “newsworthy,” MedMen contends, it does impact the public, or some segment of it in, an appreciable way” (*id.* at 13). After careful consideration of the record, the court agrees with MedMen.

The civil rights law broadly defines an “action involving public petition and participation” as a claim⁵ involving (1) “any communication in a place open to the public or a public forum in connection with an issue of public interest” or (2) “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition” (NY Civ Rights Law § 76-a [1] [a]). “Public interest,” in turn, means “any subject other than a purely private matter” (*id.* § 76-a [d]). “New York courts have generally applied a broad interpretation to what constitutes a matter of public concern” (*Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 29 [1st Dept 2022] [interpreting the 2020 amendments to the anti-SLAPP statute and finding that negative website reviews about a medical practice does constitute a matter of public interest]). “Matters of public concern include matters of political, social, or other concern to the community, even those that do not affect the general population” (*id.* at 29-30, quoting *Kesner v Buhl*, 2022 WL 718840, at *10 [SD NY, Mar. 10, 2022, No. 20 Civ. 3454 (PAE)]).

Here, MedMen’s contractual claims are predicated on Ascend’s alleged government lobbying and financial contribution activities carried out in its efforts to obtain approval for the Transaction (*see* SACC ¶¶ 149-154, 174-178). These activities are undoubtedly the type that are generally protected by the First Amendment (*see generally* *McCutchen v FEC*, 572 US 185, 191 [2014] [recognizing the right to make political contributions is protected by the First Amendment]; *Fighting Finest, Inc. v Bratton*, 95 F3d 224, 227 [2d Cir 1996] [identifying “activities that are traditionally associated with the First Amendment (*e.g.*, civic, charitable, lobbying, or fundraising activities)”]). And there *is*, to be sure, public interest in the broad issue of cannabis legalization, licensing, and use in New York that certainly has increased in recent years (MOL at 12; Opp. at 13). The Counterclaims even allude to that public interest to emphasize the alleged importance to the Transaction of complying with New York law (*see* SACC ¶¶ 1-4).

That said, even if Ascend’s interactions with CCB and OCM may touch on issues that interest the public in some way, MedMen’s claims are ultimately premised on the intricacies of a private transaction between the two parties, as well

⁵ The term “Claim” is defined as “any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief” (NY Civ Rights Law § 76-a [1] [b]).

as the corresponding contractual rights, obligations, and covenants arising under that transaction. These issues concerning the parties' rights and obligations under the Investment Agreement, and whether any covenants have been breached, are not "within the sphere of public interest" as is necessary to bring any of the Counterclaims under the ambit of the anti-SLAPP statute (*see Abbey Family Tr. No. Four v Matthews*, – AD3d –, 2023 NY Slip Op 03272, at *4 [3d Dept. 2023], citing *Miller v Appadurai*, 214 AD3d 455, 456 [1st Dept. 2023] [explaining that "although plaintiffs' pursuit of building a residence on their property may involve issues, such as the request for an area variance [from a town zoning board] or the effect on the water quality [raised in complaints to Department of Environmental Conservation], that interest the public, this action is not about those issues; rather, the purpose is to determine, as relative to these parties, the width and purpose of the easement"]; *see also Ashkenazy v Gindi*, 2022 WL 2663505, at *58 [Sup Ct, NY County July 10, 2022] [rejecting the idea that the action involving a business dispute between real estate investors constituted a matter of public interest where there was no allegation of any larger controversy that "affects the general public or some segment of it in an appreciable way"]). In other words, at their core, MedMen's claims solely relate to purely private matters.⁶

To avoid this outcome, Ascend cites to a string of cases holding that the anti-SLAPP statute covers activities seeking the approval of public boards (Reply at 3). But none of the cases cited are apposite. For example, in *Bennett v Towers*, the court concluded that plaintiffs had filed a SLAPP suit because their claims for tortious interference and defamation were directly targeting defendants' efforts to oppose plaintiffs' application to a local zoning authority for approval of a subdivision and housing construction project on an unimproved parcel of land (43 Misc 3d 661, 664-67 [Sup Ct, Nassau County, 2014]). Likewise, in *Duane Reade v Clark*, the court determined that plaintiff's defamation lawsuit was covered by the anti-SLAPP statute because it was "materially related to efforts by [defendant] to oppose [plaintiffs] application for a permit" to erect a billboard that would potentially "overshadow" a newly developed local memorial park (2 Misc 3d 1007[A], at *1-2, *6 [Sup Ct, NY County, Mar. 31, 2004]). And in *Street Beat Sportswear, Inc. v Nat'l Mobilization Against Sweatshops*, the court concluded that plaintiff had asserted a SLAPP lawsuit by advancing tortious interference claims to "inhibit [defendants] from continuing to press their claims of labor law violations before state and federal agencies" (182 Misc 2d 447, 454 [Sup Ct, NY County, 1999]). Although each of these cases did concern some form of petitioning activity, all involved lawsuits seemingly filed in an effort to stifle that activity, rather than for purposes of addressing a legitimate contractual dispute (*cf. Trump v Trump*, – NYS3d –, 2023 NY Slip Op 23180, at *4-*6 [Sup Ct, NY County, June 9, 2023] (refusing to apply anti-SLAPP

⁶ The same is true regarding those claims targeting Ascend's alleged public announcements of the Transaction without MedMen's consent under the Investment Agreement (*Appadurai*, 214 AD3d at 456 [defamation claim challenging letter circulated by professors to university dean involved "purely private matter" even if "touch[ing] on topics of public interest"]).

law at motion to dismiss stage in connection with claims related to breach of confidentiality provision in settlement agreement).⁷

In sum, the court concludes that New York's anti-SLAPP statute does not apply to any of the Counterclaims, and, as a result, CPLR 3211(g)'s heightened pleading standard does not apply. The court now turns to Ascend's motion to dismiss the Counterclaims premised on CPLR 3211(a)(1) and (a)(7).

II. Ascend's Motion to Dismiss MedMen's Counterclaims Related to the Investment Agreement (Counts I-III, V-VII, & IX)

A. MedMen's Counterclaims for Declaratory Relief Regarding the Investment Agreement (Counts I-III)

Ascend contends that the first, second, and third counterclaims are nothing more than a reframing of Ascend's breach of contract claims concerning the Investment Agreement (MOL at 13). Ascend further avers that certain of MedMen's affirmative defenses would functionally provide it with the same requested relief (*id.* at 13-14). The court concludes that only the second counterclaim is duplicative of Ascend's breach of contract claims.

"The general purpose of a declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation" (*Touro College v Novus Univ. Corp.*, 146 AD3d 679, 679-80 [1st Dept 2017] [internal citations and quotations omitted]). Accordingly, "[a] cause of action for declaratory judgment is unnecessary and inappropriate when [a party] has an adequate, alternative remedy . . ." (*Apple Records, Inc v Capital Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]; *see also Maxim, Inc. v Feifer*, 161 AD3d 551, 553 [1st Dept 2018] [dismissing declaratory judgment action because a pending breach of contract action would dispose of all issues raised by the request for declaratory relief]; *Wilson v Dantas*, 128 AD3d 176, 188 [1st Dept 2015]). This is true regarding duplicative counterclaims for declaratory judgment (*see JMF Consulting Group II, Inc. v Beverage Mktg. USA, Inc.*, 97 AD3d 540, 542 [2d Dept 2012] [dismissing counterclaim for declaratory judgment as "inappropriate" based on the availability of "adequate and alternate remedies"] [internal citations omitted]).

Here, Count II of the Complaint alleges that MedMen breached the Investment Agreement by wrongfully terminating it without any "right to do so" (Compl. ¶¶ 105-111). Meanwhile, MedMen's third counterclaim seeks a declaration

⁷ For this same reason, the First Department's recent decision in *Singer v De Blasio* (215 AD3d 440 [1st Dept 2023]) is also unpersuasive (NYSCEF # 201). In *Singer*, the First Department concluded that certain defendants were entitled to immunity from suit under the anti-SLAPP statute to the extent plaintiffs sought to impose liability targeting their lobbying activities (215 AD3d at 442). Here, by contrast, MedMen is not seeking to impose liability on Ascend based on the fact that it engaged in lobbying before the government.

that MedMen validly terminated the Investment Agreement because either (1) required government approvals were not obtained or not in a “form and substance reasonably satisfactory to MedMen,” or (2) Ascend materially breached the Investment Agreement (SACC ¶¶ 137-142). In other words, MedMen seeks a declaration that it was within its right to terminate the Investment Agreement, while Ascend claims MedMen wrongfully terminated the Investment Agreement. Thus, a successful defense by MedMen to Count II of the Complaint would effectively eliminate any case or controversy in connection with the third counterclaim, and vice versa (*see JMF Consulting*, 97 AD3d at 542; *Philadelphia Indem. Ins. Co v Harleysville Preferred Ins. Co.*, [Sup Ct, NY County, May 2, 2017] [denying leave to amend proposed counterclaim that sought “no relief other than a denial of” plaintiff’s indemnity claims]; *Worldwide Home Prods., Inc. v Bed Bath & Beyond, Inc.*, 2013 WL 247839, at *2 [SD NY Jan. 22, 2013, 11 Civ. 03633(LTS)(MHD)] [striking defendants’ counterclaim for declaratory of non-infringement because it was “nothing more than its First Affirmative Defense repackaged and is a mirror image of [p]laintiff’s claim [and] . . . dismissal of plaintiff’s infringement action would necessarily resolve it”). For this reason, the third counterclaim should be dismissed.

The court cannot reach the same conclusion regarding MedMen’s first and second counterclaims. Those claims seek declaratory relief regarding whether the government-approval closing conditions contained in Sections 7.1 and 7.3 of the Investment Agreement were satisfied (SACC ¶¶ 124-136). Although Count II of the Complaint does turn on whether MedMen wrongfully terminated the Investment Agreement, that issue is not necessarily resolved if the closing conditions implicated by the first and second counterclaims were met. Indeed, MedMen also asserted “additional and independent grounds for termination,” including “material breaches of the agreement by Ascend” (*see* SACC ¶¶ 110-112). Nor would resolution of these counterclaims impact the adjudication of Ascend’s other Investment Agreement breach of contract claims, which relate to breaches of other, unrelated provisions of the Investment Agreement (Compl. ¶¶ 97-104 [alleged breach of working capital provisions]; *id.* ¶¶ 112-29, 136-41 [alleged breach of the commercially reasonable efforts provisions set forth in Sections 5.8(a), 5.8(b), 5.8(c), and 5.11]; *id.* ¶¶ 130-35 [breach of closing requirement provisions]). Put succinctly, the first and second counterclaims are not “mirror-images” of Ascend’s breach of contract claims.⁸ Dismissal of these two counterclaims is not warranted.

B. MedMen’s Counterclaim for Breach of Section 5.8(e) of the Investment Agreement (Count V)

The fifth counterclaim alleges that Ascend breached Section 5.8(e) of the Investment Agreement by purportedly communicating with Government Authorities without prior disclosure or notice to MedMen (SACC ¶¶ 149-154). It

⁸ Nor are these counterclaims repackaged affirmative defenses (*cf.* SSAC at 87-88)

further alleges that these communications harmed MedMen by interfering with the closing of the Transaction (SACC ¶¶ 149-154). It is well settled that, to plead a cause of action for breach of contract, a plaintiff must allege that “(1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations’ and (4) defendant’s breach resulted in damages” (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022] [internal citations omitted]). In moving to dismiss, Ascend argues that Section 5.8(e) only requires notice regarding communications “in connection with the transactions contemplated . . . in advance of any filing submission or attendance” and that MedMen has failed to allege any specific communication that breached Section 5.8(e) or that was otherwise “in connection with the transactions contemplated” (MOL at 14-15). Ascend further avers that Section 5.8(e)’s provisions were only intended to address formal interactions with state officials (*id.* at 17). The court disagrees. As explained, MedMen has sufficiently pleaded that Ascend breached Section 5.8(e) of the Investment Agreement based on the facts alleged.

Under Section 5.8(e), the parties agreed to disclose “[a]ll analyses, appearances, meetings, discussions, presentations, memoranda, briefs, filings, arguments, proposals and other communications made by or on behalf of either party before any Governmental Authority or the staff or regulators of any Governmental Authority” related to the Transaction “in advance of any filing, submission or attendance,” as well as provide “prior notice” of any such interactions. (Investment Agreement § 5.8(e)). MedMen, in turn, sets forth various allegations indicating, or at least supporting a reasonable inference, that Ascend communicated, either directly or indirectly, with government officials concerning the Transaction at various points after MedMen submitted its application, and it did so without MedMen’s knowledge (*see* SACC ¶¶ 11-12, 71-81, 95). Additional materials submitted MedMen in opposition also indicate communications by and between Ascend’s representatives and government staff members without copying any MedMen representative (*see* NYSCEF # 177 ¶¶ 13-14; NYSCEF # 178).⁹ MedMen has further asserted that Ascend’s breach of Section 5.8(e) impacted the type of approval received by CCB, thereby implicating whether approval was in a form and substance reasonably satisfactory to MedMen and, accordingly, the possibility of closing the Transaction (*see* SACC ¶¶ 85-86, 101, 154). Although narrowly, these alleged facts establish a plausible breach of contract claim.

Ascend counters that MedMen’s breach of contract claim incorrectly interprets Section 5.8(e) as imposing a “blanket requirement” that one party give advanced notice of “all communications with government officials” (Reply at 9). Instead, Ascend argues, Section 5.8(e) is cabined to communications “in connection with” the Transaction that were made “in advance of any filing, submission, or

⁹ In resolving a motion to dismiss, the court may consider submissions, including affidavits, submitted in opposition (*see Candelario v MTA Bus Co.*, 21 Misc3d 1148[A], at *12 [Sup Ct, Bronx County, Nov. 25, 2008], citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]).

attendance,” and, in Ascend’s view, the only submissions or filings covered by Section 5.8 relate to MedMen’s application seeking approval (*id.*).

Not so. Section 5.8(e) contemplates communications concerning the Transaction in advance of any “attendance” at, for example, a “meeting[],” “discussion[],” or “presentation[].” These are, in turn, the types of interactions plausibly alleged in the Counterclaims. In any event, Ascend’s position concerning the interpretation of Section 5.8(e), and whether its conduct breached that provision, raises, at most, a question of fact that is not properly resolved on a motion to dismiss (*see Gedula 26, LLC v Lightstone Acquisition III LLC*, 213 AD3d 409, 410 [1st Dept. 2023] [question of fact precluded dismissal of breach of contract claim under CPLR 3211]; *Telerep, LLC v U.S. Intern. Media, LLC*, 74 AD3d 401, 402 [1st Dept. 2010] [claim concerning contract susceptible of more than one interpretation not appropriately dismissed under CPLR 3211]).

To be clear, the court’s denial of Ascend’s motion to dismiss fifth counterclaim is neither an endorsement of MedMen’s contention that Ascend’s lobbying activities and government interactions were somehow improper, illegal, or otherwise implicating the “integrity” of the Transaction approval process, nor an agreement about the ultimate merits of MedMen’s claim. Rather, the court—after accepting, *as it must*, MedMen’s allegations as true solely for purposes of this motion and drawing all reasonable inferences in MedMen’s favor—has only concluded that MedMen plausibly alleged a narrow breach of contract claim under the Investment Agreement based on Ascend’s purported failure to disclose certain alleged interactions with government officials.

Ascend’s motion to dismiss the fifth counterclaim is denied.

C. MedMen’s Counterclaims for Breach of Section 5.12 of the Investment Agreement (Counts VI & VII)

Ascend seeks dismissal of MedMen’s sixth and seventh counterclaims on theory that they are “poorly disguised defamation claims” that are not properly pleaded (MOL at 18-19). Alternatively, Ascend contends that dismissal is warranted because MedMen has not established how it can recover for reputational harm (*id.* at 30). As explained, the court disagrees that MedMen’s claims are disguised defamation claims. However, it does conclude that MedMen has failed to plead damages.

Section 5.12 of the Investment Agreement provides that “no party to [the Investment] Agreement shall make any public announcements in respect of this Agreement or the transactions contemplated hereby or otherwise communicate with any news media without the prior written consent of the other party . . .” (Investment Agreement § 5.12). MedMen, in turn, alleges that Ascend breached Section 5.12 of the Investment Agreement by making publicly pronouncements on

December 30, 2021, January 3, 2022, and January 6, 2022—all without seeking or receiving prior written consent from MedMen (SACC ¶¶ 104-107, 155-167). Although it is true MedMen alludes to Ascend's public statements as "falsely characterizing the Investment Agreement, the transactions, and MedMen's actions", the crux of these claims relate to Ascend's purported failure to obtain written consent as required under the Investment Agreement (*see id.* ¶¶ 159, 166). These breach of contract claims do not, as a result, sound in defamation, as Ascend suggests. And none of the authorities cited by Ascend in support of its contention mandate a different conclusion (*see e.g. Morrison v Nat'l Broadcasting Co.*, 19 NY2d 453, 458 [1967] [concluding that a tort cause of action sounded in defamation for purposes of determining damages pleading requirements and applicable statute of limitation]; *Better v Murdoch*, 2018 WL 3323162, at *7-8 [SD NY, June 22, 2018, 17 Civ. 10247] [concluding that state law claims stemming from the "same allegedly false and defamatory statements" sounded in defamation for purposes of calculating statute of limitations, while nevertheless analyzing breach of contract claim under usual analysis]; *Mistretta v Newsday Media Grp.*, 200 AD3d 775, 776-77 [2d Dept. 2021] [concluding that tort of negligent supervision sounded in defamation based on nature of allegations]; *Noel v Interboro Mut. Indem. Ins. Co.*, 31 AD2d 54, 55-56 [1st Dept. 1968] [concluding that tort of business interference sounded in defamation for purposes of calculating statute of limitations]).

The above notwithstanding, MedMen fails to adequately plead an actionable theory of damages in support of its claim. In setting forth its counterclaims related to Section 5.12, MedMen contends that it "has been injured" because Ascend's purported breaching conduct caused it "reputational harm" (SACC ¶¶ 106, 160, 167). But it is well settled in New York that a "claim for damages for loss of reputation arising from the alleged breach of contract is not actionable" (*Rather v CBS Corp.*, 68 AD3d 49, 55 [1st Dept. 2009]; *accord Jacobson v Seddio*, 2022 NY Slip Op 32748[U], at *4 [Sup Ct, NY County, Aug. 15, 2022] [also observing that "[a]lthough certain cases recognize that damages due to a loss of reputation may be recovered under New York contract law, these cases carefully limit such claims by requiring the plaintiff to allege specific business opportunities lost as a result of the plaintiffs diminished reputation"]; *AmTrust North Am., Inc. v KF&B, Inc.*, 2020 WL 5503479, at *1 [SD NY Sept. 11, 2020, 17-cv-5340 (LJL)] [same]).

To extent MedMen relies on *Robert T. Donaldson, Inc. v Aggregate Surfacing Corp. of America* to argue that it has adequately pleaded damages, such reliance is unavailing (47 AD2d 852 [2d Dept. 1975]). The *Robert T. Donaldson* court only concluded that plaintiff would be entitled to "loss of profits due to damage to its reputation sustained by reason of the breach" of contract, which is an entirely different theory of damages than the mere reputational harm alleged by MedMen in the Counterclaims (*id.* at 852-53). MedMen, conversely, does not offer any other non-conclusory or non-speculative damages theory indicating a loss of profits that resulted from Ascend's alleged breach of Section 5.12.

The sixth and seventh counterclaims are dismissed.

D. MedMen's Counterclaim for Breach of Good Faith and Fair Dealing Related to the Investment Agreement (Count IX)

Finally, in its ninth counterclaim, MedMen contends that Ascend deprived MedMen of the “benefit of a proper and transparent approval of Ascend’s investment” by purportedly using a “clandestine campaign of influence on government officials” (SACC ¶¶ 174-178). In response, Ascend argues that it acted consistent with its obligation to submit all required filings under Section 5.8 of the Investment Agreement, and that no allegations in the Counterclaims indicate that Ascend acted to deprive MedMen of its benefits under the Investment Agreement (MOL at 22-25).

“Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance” (*Atlas Elevator Corp. v United Elevator Grp., Inc.*, 77 AD3d 859, 861 [2d Dept 2010]). Pursuant to this implied covenant, “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.*). Yet, “[w]hile the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights” (*Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, 268 [1st Dept 2003]). Nor can one party invoke the duty of good faith to imply obligations inconsistent with the terms of the contractual relationship (*see Gottwald v Sebert*, 193 AD3d 573, 582 [1st Dept 2021]; *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73 [1st Dept 2000]). Ultimately, “a party who asserts the existence of an implied-in-fact covenant bears a heavy burden’ to ‘prove not merely that it would have been better or more sensible to include such a covenant, but rather that the particular unexpressed promise sought to be enforced is in fact implicit in the agreement viewed as a whole” (*Singh v City of New York*, – NY3d –, 2023 NY Slip Op 02141, at *2-3 [2023], quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978]).

Here, the Investment Agreement sets forth numerous obligations requiring the parties to take steps to obtain governmental approvals and consents concerning the Transaction that would facilitate a closing (*see e.g.* Investment Agreement §§ 5.8, 7.1, 7.2, 7.3). And, as MedMen essentially concedes, Ascend’s purported actions were done to gain the requisite government approvals required under the Investment Agreement and consummate the Transaction (Opp. at 25-26). Thus, even accepting all allegations in the Counterclaims as true, the purported implied covenant endorsed by the ninth counterclaim would improperly impose obligations that effectively nullify the express, bargained-for contractual provisions of the Investment Agreement, and/or imply terms inconsistent with the parties’ contractual relationship. As a result, Ascend’s motion to dismiss the ninth counterclaim is granted.

III. Ascend's Motion to Dismiss MedMen's Counterclaims Related to the Term Sheet (Counts IV, VIII, & X)

MedMen advances several counterclaims related to Ascend's purported breach of the Term Sheet (SACC ¶¶ 143-148, 174-183). Ascend moves to dismiss those claims by arguing that the Term Sheet is a "non-binding preliminary agreement" (MOL at 25-27). MedMen counters that the Term Sheet is binding and enforceable and only left "certain non-material terms" open for negotiation (Op. at 26-30).

To establish the existence of an enforceable agreement, a plaintiff must show that there was "an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (*Ostojic v Life Med. Techs., Inc.*, 201 AD3d 522, 523 [1st Dept 2022], citing *Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). Generally, "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, that intent is honored" (*Kowalchuk* 61 AD3d at 123, quoting *Jordan Panel Sys. Corp.*, 45 AD3d 165, 169 [1st Dept 2007]; accord *Stonehill Cap. Mgmt., LLC v Bank of the West*, 28 NY3d 439, 451 [2016] 451). Courts will "look to the 'objective manifestation of the intent of the parties as gathered by their expressed words and deeds" (*Stonehill Cap. Mgmt.*, 28 NY3d at 448-49). But courts should not give "[d]isproportionate emphasis" on any single act, phrase, or other expression"; instead they should consider "the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*id.* at 449, quoting *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399 [1977]).

In some cases, an agreement will contain, among its plain terms, references to certain conditions precedent. The Court of Appeals addressed this otherwise unremarkable proposition in the context of settlement agreements in *IDT Corp. v Tyco Grp.* (13 NY3d 209, 214 [2009]) [hereinafter, *IDT I*]. As the *IDT I* court explained, most conditions precedent "describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself" (*id.*). Such conditional agreements may nevertheless oblige parties to "negotiate in good faith" (*IDT Corp. v Tyco Grp., S.A.R.L.*, 23 NY3d 497, 502-03 [2014] [hereinafter, *IDT II*]; see also *DeCristofaro v Nest Seekers E. End, LLC*, 54 Misc3d 1209[A], at *9 [Sup Ct, Suffolk County, Jan. 11, 2017] ["when an agreement contemplates the negotiation of later agreements that are a precondition to a party's performance, the parties are required to negotiate the terms of the later agreements in good faith."]).

When determining the applicability of purported conditions precedent in a settlement term sheet, courts will consider "whether there has been 'an explicit reservation that there would be no contract [or obligation to perform] until the full formal document is completed and executed'" (see *Go New York Tours, Inc. v Tour*

Central Park Inc. 216 AD3d 455, 457 [1st Dept 2023], citing *Kowalchuk*, 61 AD3d at 123). That said, the fact that an agreement contains qualifying “subject to” language (or some similar variation thereof) is just one factor for courts to consider when ascertaining the parties’ intent to be bound to an agreement’s obligations (*compare McGowan v Clarion Partners, LLC*, 188 AD3d 497, 498 [1st Dept. 2020] [term sheet “subject to signed documentation” that was a “preliminary agreement contingent on and not intended to be binding absent formal documentation” not enforceable] and *Weksler v Weksler*, 163 AD3d 432, 432 [1st Dept. 2018] [parties’ “broad outline” of terms for settlement agreement that was “subject to” execution of an “extensive agreement” in light of a “number of open terms not contemplated by stipulation” was unenforceable], with *Go New York Tours*, 216 AD3d at 455 [use of phrase “subject to” standing alone did not amount to express reservation of right not to be bound to obligations where parties email agreement set forth all material terms and subsequent actions by the parties indicated their understanding that a final settlement agreement was achieved] and *Stonehill Cap. Mgmt.*, 28 NY3d at 451-52 [concluding that “subject to” language did not express intend not to be bound where email only stated that closure of the transaction required execution of a signed document and the tender of a 10% deposit]).

Here, a review of the Term Sheet indicates that the parties intended that it “set forth [their material rights and obligations,” including mutual releases, “Closing Date” terms, and additional payment terms (Term Sheet at 1-3). The parties agreed that they would, in turn, “use their best efforts to execute the Settlement Agreement” (Term Sheet at 1). Based on these facts, the parties entered a binding agreement that obligated them to negotiate in good faith (*see IDT II*, 23 NY3d at 503; *119 Spring LLC v 119 Spring Street Co., LLC*, 2014 NY Slip Op 31134[U], at *4-5 [Sup Ct, NY County, April 28, 2014]).

However, although a portion of MedMen’s eighth counterclaim is premised on Ascend’s negotiation conduct (*see* SACC ¶¶ 121-22, 170, 172), MedMen does not sufficiently allege that Ascend failed to meet its obligation to negotiate in good faith. To start, MedMen avers that Ascend refused to engage with the draft settlement and transaction documents (*id.* ¶¶ 121-22). Yet the documentary evidence submitted by Ascend directly refutes this contention by revealing that (1) Ascend, not MedMen, initiated the outreach to negotiate the relevant documents, and (2) the parties engaged in multiple rounds of comments and edits over the course of twelve days in hopes of completing the transaction (*see* NYSCEF # 161-167).

The balance of MedMen’s claim is premised on conclusory and speculative assertions of Ascend’s purported motivations underlying it is refusal to execute a final settlement, which MedMen firmly expects” discovery to substantiate (SACC ¶ 122). Such allegations are plainly insufficient to survive a motion to dismiss (*see Milosevic v O’Donnell*, 89 AD3d 628, 629 [1st Dept. 2011] [“Dismissal of the claims cannot be avoided by speculation as to what discovery might reveal”]; *HT Cap. Advisors, L.L.C. v Optical Resources Grp., Inc.*, 276 AD2d 420, 420 [“Although

plaintiff asserts that discovery will permit it to substantiate its claims, its ‘vague and conclusory allegations and expression of hope that discovery, if and when conducted, might provide some factual support for [its cause of] action . . . provide an insufficient basis for failing to dismiss a patently defective cause of action’’).

Although the Term Sheet’s good faith negotiation requirement is enforceable, the same cannot be said for its substantive terms. As noted above, the Term Sheet contemplated “other terms” to incorporate into a “definitive” settlement agreement (Term Sheet at 1). This included “new or amended transactional documents . . . as necessary to “effectuate the Settlement and close the Transaction” (Term Sheet at 1-3). For that reason, the closing of the Transaction under the Term Sheet was expressly conditioned on “executing the Settlement Agreement and Transactional Agreements” (Term Sheet at 3). This is a clear expression by the parties to condition the “material terms” of the Term Sheet—including the closing date and contemplated additional payments—on the preparation and completion of agreements that the parties’ acknowledged would be “necessary” to any settlement and closing. In other words, the negotiation and execution of the settlement agreement and Transaction agreements were conditions precedent to any substantive obligations arising under the Term Sheet (*119 Spring LLC*, 2014 NY Slip Op 31134[U] at *4-5 [concluding that letter of intent contemplating negotiation of later purchase agreement needed to close deal amounted to “preliminary non-binding proposal to agree’’]). MedMen’s breach of contract claim premised on the Term Sheet is accordingly dismissed.

The above reasoning would also compel dismissal of MedMen’s fourth and tenth counterclaims. In any event, both counterclaims are based on the same operative facts as the eighth counterclaim, and they either seek a declaration of the same rights and obligations arising out of the Term Sheet (Count IV) or the same damages (Count X) (*compare* SACC ¶¶ 174-78 *with id.* ¶¶ 143-48, 179-83). Accordingly, the court would also dismiss these claims as duplicative of the breach of contract claim (*Netologic, Inc. v Goldman Sachs Grp., Inc.*, 110 AD3d 433, 433-34 [1st Dept. 2013] [breach of implied covenant claim duplicative of breach of contract claim]; *Tahari v Narkis*, 216 AD3d 557, 557 [1st Dept. 2023] [declaratory judgment claim dismissed as duplicative]).

At bottom, the court grants Ascend’s motion to dismiss the fourth, eighth, and tenth counterclaims.

CONCLUSION

For the foregoing reasons, it is

ORDERED that plaintiffs-counterclaim defendants’ motion to dismiss defendants-counterclaim plaintiffs’ verified amended counterclaims is granted with respect to Counts III, IV, VI, VII, VIII, IX, and X; and it is further

ORDERED that plaintiffs-counterclaim defendants' motion to dismiss is denied with respect to Counts I, II, and V; and it is further

ORDERED that within 30 days of the e-filing of this order, plaintiffs counterclaim defendants shall file an answer to the verified amended counterclaims; and it is further

ORDERED that a status conference shall be held via Microsoft Teams on September 20, 2023, at 10:30 a.m. or at such other time that the parties shall set with the court's law clerk.

This constitutes the Decision and Order of the court.

08/21/2023	
DATE	MARGARET A. CHAN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE