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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

WILLIAM H. GROSS, an individual, Plaintiff, vs. PACIFIC INVESTMENT MANAGEMENT COMPANY LLC, a Delaware limited liability company, ALLIANZ ASSET MANAGEMENT OF AMERICA L.P., a Delaware limited partnership, and DOES 1 to 100, inclusive, Defendants.	))	Case No. 30-2015-00813636-CU-BC-CJC **DEFENDANTS PACIFIC INVESTMENT MANAGEMENT COMPANY LLC AND ALLIANZ ASSET MANAGEMENT OF AMERICA L.P.'S JOINT NOTICE OF HEARING ON DEMURRER AND DEMURRER TO COMPLAINT OF PLAINTIFF WILLIAM H. GROSS; MEMORANDUM OF POINTS AND AUTHORITIES** Date: March 14, 2016 Time: 10:00 a.m. Reservation No.: 72264949 Dept.: C10 Hon. Linda S. Marks Complaint Filed: October 8, 2015

NOTICE OF HEARING ON DEMURRER AND DEMURRER TO COMPLAINT

TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on March 14, 2016 at 10:00 a.m. or as soon thereafter as counsel may be heard in Department C10 of the Superior Court of California for the County of Orange, located at 700 West Civic Center Drive, Santa Ana, CA 92701, Defendants Pacific Investment Management Company LLC ("PIMCO") and Allianz Asset Management of America L.P. ("AAMOA") (collectively "Defendants") will and do demur to the Complaint of Plaintiff William H. Gross.

Pursuant to California Code of Civil Procedure section 430.10(e), Defendants hereby jointly and severally demur to the First, Second, and Third Causes of Action of the Complaint filed in this action by Plaintiff as follows:

Demurrer to First Cause of Action:

1. The First Cause of Action alleged against Defendants as set forth in the Complaint fails to state facts sufficient to constitute a cause of action.

Demurrer to Second Cause of Action:

2. The Second Cause of Action alleged against Defendants as set forth in the Complaint fails to state facts sufficient to constitute a cause of action.

Demurrer to Third Cause of Action:

3. The Third Cause of Action alleged against Defendants as set forth in the Complaint fails to state facts sufficient to constitute a cause of action.

The demurrer is based on this notice, the attached Demurrer, the attached Memorandum of Points and Authorities, the Request for Judicial Notice, the Declaration of Tucker Fitzpatrick, and the Proposed Orders, filed concurrently herewith, the Complaint in the action, and such argument as Defendants may present at or before the hearing.

DATED: November 9, 2015

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PRELIMINARY STATEMENT

Mr. Gross's Complaint is a legally groundless and sad postscript to what had been a storied career at PIMCO, the global investment management firm. This suit is only the latest step in Mr. Gross's effort to resurrect a personal reputation damaged by his own unacceptable behavior. During his final year with PIMCO, Mr. Gross engaged in a pattern of conduct that was incompatible with the values and standards that PIMCO expected of those entrusted with its leadership. When Mr. Gross finally came to understand that PIMCO would not exempt him from these standards, he abruptly resigned from the firm without notice or transition—disregarding the potential impact on the individual and institutional clients whose assets he was responsible for managing.

Now, one year later, Mr. Gross comes to this Court seeking hundreds of millions of dollars based on a jumbled set of contract theories. Two are based on what he claims were unwritten contracts, and the third is based on a written bonus plan whose clear language actually invalidates his theories. The Complaint, parts of which read more like a screenplay than a court pleading, uses irrelevant and false personal attacks on Mr. Gross's former colleagues in an apparent effort to distract attention from the fundamental failings of these "contract" claims. Stripped of its invective, the Complaint suffers from two fatal flaws. First, its allegations are untrue. Second, even if every well-pled fact were assumed to be true, the Complaint fails to state any viable legal claim. The first flaw is, of course, irrelevant at the demurrer stage. The second flaw, however, is dispositive.

As explained in Point I below, the First Cause of Action for constructive termination fails for two independent reasons. *First*, the claim fails to sufficiently allege the existence of either of the two purported unwritten agreements on which it relies: an "implied employment contract" (Compl. ¶ 85) for a "guarantee of employment" (*id.* ¶ 82) through 2019, based solely on Mr. Gross's election to an officer position at PIMCO (*id.* ¶¶ 82-84, 92); and an oral "deal" supposedly reached shortly before he resigned in September 2014, which guaranteed him employment through at least the end of 2014 (*id.* ¶ 91). Nor does Mr. Gross adequately plead that his purported "termination" violated any public policy, making only a conclusory

reference to rights under the First Amendment (*id.* ¶ 90), which of course does not govern the conduct of non-governmental parties such as Defendants. *Second*, Mr. Gross in any event does not (and could not plausibly) allege that Defendants coerced his resignation by imposing extraordinary, egregious, and **objectively** intolerable working conditions.

As explained in Point II below, the Complaint fails to allege any breach of the written contract upon which Mr. Gross relies for his Second Cause of Action (the "Profit Sharing Plan" attached as Exhibit 1 to his Complaint). The unambiguous language of the Profit Sharing Plan shows that the rights claimed by Mr. Gross simply do not exist. As explained in Point III below, Mr. Gross's attempted reliance on an implied covenant of good faith and fair dealing in his Third Cause of Action fails because an implied covenant cannot, as a matter of law, create rights that contradict express written terms.

PIMCO has moved forward since Mr. Gross's resignation. It is time for him to do the same, instead of treating this Court as a forum to engage in the kind of reputational warfare embodied in his legally groundless Complaint. The Court should reject Mr. Gross's effort to turn a baseless bonus claim into a prolonged litigation, and should sustain the demurrer without leave to amend.

THE ALLEGATIONS OF MR. GROSS'S COMPLAINT

1. Mr. Gross, PIMCO and AAMOA

Mr. Gross describes himself as "a world-renowned investment manager" who co-founded Defendant PIMCO. (Compl. ¶¶ 2, 6.) He alleges that PIMCO is "one of the leading fixed income security investment firms in the world." (Compl. ¶ 2.) He further alleges that PIMCO paid him $300 million in 2013 (*id.* ¶ 75), and at least $16 million in 2014. (*Id.* ¶ 77.)

According to the Complaint, Defendant AAMOA is a Delaware limited partnership (Compl. ¶ 8) and the "Managing Member" of PIMCO. (Compl. Ex. 1 p. 1.)

2. The Written Profit Sharing Plan

PIMCO's "managing directors," including Mr. Gross, were participants in a quarterly bonus pool established and governed by Exhibit 1 to the Complaint. (Compl. ¶ 76.) Mr. Gross claims to have been "entitled to receive 20% of the entire profit sharing bonus pool each year"

(*id.* ¶ 3), but no basis for this supposed entitlement appears in the Profit Sharing Plan.

Section 3.1 of the Profit Sharing Plan states that a termination of employment, unless due to death or disability, also terminates participation in the Plan, except for any unpaid amount for the completed Covered Quarter preceding termination:

> **Upon the Termination of Employment of a Participant**, unless otherwise provided in his or her employment agreement, if any, his or her **participation in the Plan shall be terminated, <u>except</u> with respect to the Profit Sharing payable (i) with respect to the Covered Quarter preceding his or her Termination** of Employment and (ii) with respect to a Termination of Employment due to death or permanent disability, with respect to the partial Covered Quarter in which such Termination of Employment due to death or disability occurs.

(Compl. Ex. 1 § 3.1, emphasis added.) Thus, under the unambiguous terms of the Profit Sharing Plan, when his employment terminated prior to the end of the third quarter on September 30, 2014, Mr. Gross's participation terminated, except with respect to the second quarter of 2014—which he admits was already paid to him. (Compl. ¶ 77.)

Regarding Defendants' powers to terminate a Participant in PIMCO's profit sharing program, the Profit Sharing Plan provides:

> Neither the Company's establishment of the Plan nor the provisions contained in the Plan shall be deemed to give any Participant any right to continued employment with the Company . . . ; **the Company . . . expressly retain and reserve their right to terminate the employment of any Participant <u>at any time</u>** (subject only to the terms of any applicable employment agreement and/or the Company Agreement).

(Compl. Ex. 1 § 4.5, emphasis added.)

Mr. Gross does not plausibly allege any applicable employment agreement, much less a written contract of employment. (See, *infra*, Parts I.A.1 and I.A.2.) As for the Company Agreement, it defines the termination rights reserved by the Profit Sharing Plan as follows:

> The Company may have employees and agents who may be designated as officers with titles. **Any such officers shall be appointed and may be removed at any time, without or without [sic] cause**, by the Managing Member. The initial officers of the Company shall consist of a Chief Executive Officer, a Chief Investment Officer, one or more Managing Directors and such other officers . . . as . . . are necessary . . . . **Each officer of the Company shall hold his office until his successor is appointed and approved, if applicable, or until his earlier resignation, removal, incapacity or death.**

(Declaration of Tucker Fitzpatrick ("Fitzpatrick Decl.") Ex. A § 9.5(a), emphasis added.)[1]

3. The Purported Implied Contract for Employment Through 2019

Mr. Gross alleges that he was "reelected to his position as Chief Investment Officer in 2014. Mr. Gross's election carried a term of five years." (Compl. ¶ 83.) From this alone, the Complaint jumps to the legal conclusion that the five-year "term of office creates what in effect is a guarantee of employment at PIMCO," and that after election to such an office, "holders of that position can expect that they would only be terminated by PIMCO for good cause." (*Id.* ¶ 82.) Mr. Gross claims that his election "effectively guaranteed Mr. Gross's position at PIMCO until the next election cycle in 2019" (*id.* ¶ 84), and constituted "an implied employment contract." (*Id.* ¶ 85.) However, as set forth above, the Company Agreement explicitly allows for the removal of officers, including the Chief Investment Officer.

4. The Purported Oral Contract for Employment Through December 2014

The Complaint alleges that in September 2014, Mr. Gross discussed details of a possible transition plan with the "former head of [non-party] Allianz Global Investors" and "the former PIMCO Chief Executive Officer." (Compl. ¶ 60.) The Complaint further alleges that during that discussion, "Mr. Gross agreed that he would resign as Chief Investment Officer, as Chairman of the Investment Committee, and as a member of both the Executive Committee and the Partners Compensation Committee. . . . Mr. Gross also agreed to have his annual bonus cut by half or more." (*Id.* ¶ 61.) According to the Complaint, "Mr. Gross even agreed he would cease all management of the PIMCO Total Return Bond Fund that he had built and would instead be handed control of a portfolio that was less than 10% in size of his then-current assets under management." (*Id.* ¶ 62.) Mr. Gross also asserts that he "agreed to what he considered further humiliation: Mr. Gross would be barred from the PIMCO offices,

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[1] The Profit Sharing Plan defines "Company Agreement" as PIMCO's effective LLC Agreement. (Compl. Ex. 1 p. 2.) As explained in the Request for Judicial Notice and Fitzpatrick Declaration served concurrently herewith, the Court may take notice of the terms of the Amended and Restated PIMCO LLC Agreement, dated as of January 1, 2012, and the First Amendment thereto, effective as of May 27, 2014, which are attached as Exhibits A and B to the Fitzpatrick Declaration. Together these documents were the "Company Agreement" under the Profit Sharing Plan throughout 2014.

and left to handle the remaining portfolio from another office separate and away from PIMCO's." (*Id.* ¶ 63.) Mr. Gross alleges that he "believed [this arrangement] would be better for PIMCO and its investors than the alternative of a protracted fight among PIMCO's leadership," and "allowed him to return to bond investing, free of the battles" with PIMCO executives with whom he disagreed. (*Id.* ¶ 64.)

Mr. Gross claims that on or about September 18, 2014, Mr. Diekmann—the CEO of undefined non-party "Allianz" (Compl. ¶ 60)—"formally offered Mr. Gross the same plan that had been 'worked out' in the prior day's meeting" among Messrs. Gross, Faber and Thompson, which "Mr. Gross accepted." (Compl. ¶ 66.) According to the Complaint, Mr. Diekmann assured Mr. Gross that he "would have a position at PIMCO at a minimum through the end of 2014." (*Id.* ¶ 91.) The Complaint does not allege that Mr. Diekmann held any position at PIMCO or AAMOA, or had the authority to bind either.

5. <u>Mr. Gross's Resignation from PIMCO</u>

The Complaint claims that after Mr. Diekmann and Mr. Gross struck the alleged "deal" (Compl. ¶ 91), Mr. Diekmann then discussed "the plan" with PIMCO's Chief Executive Officer, Douglas Hodge. (*Id.* ¶ 67.) The Complaint alleges that Mr. Hodge, along with Mr. Diekmann, later met with Mr. Gross. (*Id.* ¶ 69.) Mr. Hodge supposedly "proceeded to outline an entirely different role for Mr. Gross than the one that Diekmann had agreed to just hours before and that Mr. Gross had previously negotiated." (*Id.* ¶ 70.) The Complaint does not explain how the role outlined by Mr. Hodge differed from the "plan" Mr. Gross had discussed with Mr. Diekmann. But the Complaint does allege that Mr. Hodge's proposal would allow Mr. Gross "to remain at PIMCO through December 2014." (*Id.* ¶ 71.) The Complaint alleges that "Mr. Gross was told that if he did not accept this new proposal, he would be terminated from PIMCO immediately." (*Id.* ¶ 72.)

The Complaint states that Mr. Gross did not accept the proposal. (Compl. ¶73.) It does not allege that PIMCO actually terminated him (because it did not). He left PIMCO several days "before the third quarter ended on September 30." (*Id.* ¶ 78.) The Complaint characterizes his departure as being "forced out," (*id.* ¶¶ 73, 78), and asserts that it "was, in

effect, a termination," invoking the concept of constructive termination. (*Id.* ¶ 89.) Mr. Gross alleges that his departure prior to the end of 2014 breached the two unwritten employment agreements discussed above. (*Id.* ¶¶ 91-92.)

LEGAL STANDARD

In evaluating a demurrer, courts accept well-pled factual allegations, but should disregard "contentions, deductions or conclusions of facts or law" (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591) and "may consider . . . matters which are properly the subject of judicial notice." (*Davis v. Ford Motor Credit Co.* (2009) 179 Cal.App.4th 581, 589.)

ARGUMENT

The Complaint includes three Causes of Action, none of which states a claim. Defendants address them below in the order that they are pled in the Complaint.

I. THE CONSTRUCTIVE TERMINATION CLAIM FAILS BECAUSE MR. GROSS FAILS TO PLEAD THAT HIS RESIGNATION WAS A TORT OR BREACH OF CONTRACT, OR WAS COERCED.

The First Cause of Action of the Complaint is for constructive termination, which requires Mr. Gross to allege at least two things. First, Mr. Gross must allege either "a breach of contract or tort in connection with employment termination." (*Turner v. Anheuser–Busch, Inc.* (1994) 7 Cal.4th 1238, 1251 (hereafter *Turner*), disapproved on another ground in *Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479, 498.) Second, he "must plead . . . that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Id.*) The Complaint fails to satisfy either of these requirements.

A. Mr. Gross Fails to Plead That His Resignation Was a Tort or Breach of Contract.

The Complaint posits that Mr. Gross's purportedly forced resignation: (1) violated Defendants' implied "commitment to employ Plaintiff for a full term of five years following his most recent election to the PIMCO Executive Committee and the PIMCO Investment

Committee" (Compl. ¶ 92), (2) violated an oral agreement between Mr. Gross and Mr. Diekmann that Mr. Gross "would have a position at PIMCO at a minimum through the end of 2014" (*id.* ¶ 91), or (3) "was contrary to public policy" (*id.* ¶ 90). None of these assertions adequately pleads a tort or breach of contract.

1. **Mr. Gross Fails to Plead the Existence of an Implied Contract.**

Mr. Gross alleges that, because PIMCO elects executives to internal committees and other posts for a "term of years" (Compl. ¶¶ 81-83), it entered into an "implied employment contract" with him (*id.* ¶ 85) upon his 2014 election to a post that "effectively guaranteed Mr. Gross's position at PIMCO until the next election cycle in 2019." (*Id.* ¶ 84.) This theory fails for two independent reasons.

First, a "contract requiring termination only for cause will not be implied if there is an express writing providing to the contrary. There cannot be a valid express contract and an implied contract, each embracing the same subject, but compelling different results." (*Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1387.) Here, the written terms governing Mr. Gross's employment relationship expressly confirm that he was removable without cause and at any time. Under the Profit Sharing Plan—the written contract that Mr. Gross claims was breached (Compl. ¶¶ 95-98)—Defendants expressly "reserve their right to terminate the employment of any Participant **at any time** (subject only to the terms of any applicable employment agreement and/or the Company Agreement)." (Compl. Ex. 1 § 4.5, emphasis added.) In turn, the Company Agreement states that officers "**may be removed at any time**" and "**without cause**" and that the officer "shall hold his office until his successor is appointed and approved . . . **or until his earlier** resignation, **removal**, incapacity or death." (Fitzpatrick Decl. Ex. A § 9.5(a), emphasis added.) Because Mr. Gross alleges an "implied employment contract" (Compl. ¶ 85) that contradicts the written terms governing his employment, the implied contract theory fails.[2]

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[2] Mr. Gross vaguely alleges that the purported breach of an "implied employment contract" deprived him of the future value of unvested stock options and equity grants. (Compl. ¶ 86.) This damages claim fails for the same reason the implied contract claim fails.

Second, even if PIMCO had the improbable practice of implicitly guaranteeing years of employment to executives elected to committees or offices—despite the fact that Mr. Gross does not allege one—practice alone is insufficient to give rise to an implied contract. (See *Sappington v. Orange Unified Sch. Dist.* (2004) 119 Cal.App.4th 949, 954-955 (hereafter *Sappington*) [twenty-year practice of defendant paying for healthcare did not give rise to a contractual entitlement].)

2. The Complaint Fails to Plead that Mr. Diekmann Had the Authority to Bind Defendants, the Existence of an Enforceable Agreement Between Mr. Gross and Mr. Diekmann, or a Breach of that Purported Agreement.

Mr. Gross alleges that his resignation "violated the deal struck between Mr. Gross and Diekmann in September 2014 where PIMCO further guaranteed that Mr. Gross would have a position at PIMCO at a minimum through the end of 2014." (Compl. ¶ 91.) This claim fails for three independent reasons.

First, to prove "a contract claimed to be binding on the corporation," a party must show that "it was made on its behalf by someone who had authority to act for" the corporation. (*Meyer v. Glenmoor Homes, Inc.* (1966) 246 Cal.App.2d 242, 252.) Mr. Gross never alleges how Mr. Diekmann, the CEO of undefined non-party "Allianz" (Compl. ¶ 60), could bind Defendants. Even assuming, contrary to fact, that Allianz was "the owner of PIMCO" (*id.* ¶ 58), mere ownership would not imply the power to legally bind PIMCO. Nor does the allegation that PIMCO management "still . . . had to get Allianz, the owner of PIMCO, on board with this illicit plan" (*id.* ¶ 58) plead that Mr. Diekmann had the requisite authorization; Defendants' obligation to obtain Allianz's consent would not confer upon Mr. Diekmann the additional power to bind Defendants. Indeed, the Complaint acknowledges that Mr. Diekmann could not have bound Defendants to terms with Mr. Gross when it alleges that, after meeting with Mr. Gross, "Diekmann left . . . to ensure that **PIMCO** . . . agreed to the plan." (*Id.* ¶ 67, emphasis added.)

Second, although Mr. Gross seeks "to collect all bonuses and other compensation" based on his oral conversation with Mr. Diekmann (Compl. ¶ 91), the Complaint does not

allege that Mr. Diekmann agreed to pay Mr. Gross any ascertainable sum for his services. Instead, it vaguely alleges that Mr. Diekmann promised to pay an "annual bonus cut by half or more." (*Id.* ¶ 61.) The amount of compensation allegedly due is thus "wholly unascertainable," and the alleged contract unenforceable. (Civ. Code, § 1598; see *Goldberg v. City of Santa Clara* (1971) 21 Cal.App.3d 857, 861 [demurrer granted where promise for "additional compensation" was "too vague"]; *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 771 ["amorphous promise to 'consider' what employees at other companies are earning" was too vague to enforce].)

Third, Mr. Gross fails to allege that Defendants breached any promise made by Mr. Diekmann. Although the Complaint asserts that PIMCO's separation proposal involved "an entirely different role for Mr. Gross than the one that Diekmann had agreed to" (Compl. ¶ 70), it never identifies a single difference between Mr. Diekmann's alleged promise and the PIMCO proposal. The only requirement of PIMCO's proposal alleged by the Complaint—that "Mr. Gross would be 'allowed' to remain at PIMCO through December 2014" (*id.* ¶ 71)—is in fact not inconsistent with the alleged oral agreement, because Mr. Gross alleges that Mr. Diekmann promised him "a position at PIMCO at a minimum through the end of 2014." (*Id.* ¶ 91.) In light of Mr. Gross's failure to identify any promise that Defendants supposedly breached, the Court must disregard the conclusory assertion that the separation proposal somehow involved an "entirely different role for Mr. Gross." (*Id.* ¶ 70.)

3. <u>Mr. Gross Fails to Plead a Violation of a Fundamental Public Policy.</u>

The tort-based version of constructive discharge (as distinct from the contract-based version discussed above) requires Mr. Gross to "prove that his dismissal violated a policy that is . . . embodied in a statute or constitutional provision." (*Turner*, *supra*, 7 Cal.4th at 1256.) Mr. Gross claims his alleged constructive discharge was "contrary to public policy, as it was designed to deprive Plaintiff of income that had been earned, as well as to punish Plaintiff for protected conduct, including but not limited to the exercise of his First Amendment rights." (Compl. ¶ 90.) Neither of these theories is viable.

First, the First Amendment theory fails because the First Amendment is "a guarantee

only against action taken by the government." (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 81.) Mr. Gross admits Defendants are private entities. (Compl. ¶¶ 7-8.)

Second, Mr. Gross has not pled facts supporting his theory that Defendants denied him "income that had been earned." (Compl. ¶ 90.) As explained below, he was ineligible based on the unambiguous terms of the contract for the additional bonus he seeks. (See, *infra*, Part II.A; *Lucian v. All States Trucking Co.* (1981) 116 Cal.App.3d 972, 975 (hereafter *Lucian*) [rejecting claim for denial of "earned" wages where the denied bonus was conditioned on the employee completing "the current calendar year in service of his employer"].)[3]

B. Mr. Gross Fails to Plead Facts Demonstrating
<u>That Defendants Forced Him to Resign.</u>

The constructive termination claim also fails because Mr. Gross fails to allege that the "conditions giving rise to" his resignation were "sufficiently **extraordinary and egregious** to overcome the normal motivation of a competent, diligent, and reasonable employee . . . . The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner*, *supra*, 7 Cal.4th at 1246, emphasis added.)

As an initial matter, the Complaint admits Mr. Gross "agreed" and was willing to: (1) "resign as Chief Investment Officer, as Chairman of the Investment Committee, and as a member of both the Executive Committee and the Partners Compensation Committee" (Compl. ¶ 61), (2) "cease all management of the PIMCO Total Return Bond Fund" (*id.* ¶ 62), and (3) "be barred from the PIMCO offices, and left to handle the remaining portfolio from another office separate and away from PIMCO's." (*Id.* ¶ 63.) Thus, the Complaint fails to allege that Mr. Gross could not tolerate these changes.[4]

---

[3] Although the Complaint includes a handful of vague and conclusory assertions that Defendants committed "deceit on investors" (Compl. ¶ 73; see also *id.* ¶ 71), it never asserts that any statement, action or omission by either Defendant constituted a violation of any law or legal duty to the public or investors. (See *id*. ¶ 90.)

[4] In any event, a "demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge." (*Turner*, *supra*, 7 Cal.4th at 1247; see also *Lee v. Bank of Am.* (1994) 27 Cal.App.4th 197, 213 ["A demotion is not a constructive discharge"]; *Gibson v. Aro Corp.* (1995) 32 Cal.App.4th 1628, 1636 ["embarrassment . . . does not convert . . . demotion into a constructive discharge"].)

The one condition that Mr. Gross alleges he could not tolerate was an orderly transition process, which the Complaint caricatures as an effort to "conceal the news" of his termination "from investors, the press, and the market generally." (Compl. ¶¶ 71, 73.) On its face, this circumstance is not intolerable. Mr. Gross admits that he had been considering "succession plans" **since 2007**. (*Id.* ¶ 21.) Although he characterizes the proposal as a "deceit on investors" (*id.* ¶ 73), he fails to plausibly allege what would be intolerable (or even unusual) about an orderly three-month transition period. These conclusory allegations do not adequately plead that Mr. Gross's "resignation was coerced" by intolerable working conditions. (*Turner*, *supra*, 7 Cal.4th at 1246.)

Moreover, the Complaint does not allege any facts to suggest that defendant AAMOA employed Mr. Gross or made his working conditions objectively intolerable. The absence of such allegations is an additional reason for sustaining a demurrer as to defendant AAMOA.

II. THE CLAIM FOR BREACH OF WRITTEN CONTRACT FAILS AS A MATTER OF LAW.

The Second Cause of Action of the Complaint alleges that Defendants breached the Profit Sharing Plan. To state a claim for breach of a written contract, a complaint of course must identify the promise allegedly breached. (See *Progressive W. Ins. Co. v. Yolo Cnty. Superior Court* (2005) 135 Cal.App.4th 263, 281) [plaintiff failed to state a claim because "no provision of the contract" imposed the obligation allegedly breached by defendant].) Moreover, "any allegation contradictory" to "the alleged writing or which falsely construes it, must be disregarded." (*Albaugh v. Moss Const. Co.* (1954) 125 Cal.App.2d 126, 130.)

A. Mr. Gross Was Not Eligible for the Third Quarter Bonus He Seeks.

Mr. Gross claims that PIMCO refused "to pay Mr. Gross any portion of his third quarter bonus, in breach of the Plan." (Compl. ¶ 79; see also *id.* ¶ 102.) This claim fails because the unambiguous text of the Profit Sharing Plan—that is, the written contract on which Mr. Gross relies—demonstrates that he was not eligible for a third quarter bonus.

The Profit Sharing Plan states in part:

Upon the Termination of Employment of a Participant, unless otherwise

> provided in his or her employment agreement, if any, his or her participation in the Plan shall be terminated, except with respect to the Profit Sharing payable (i) with respect to the Covered Quarter preceding his or her Termination of Employment and (ii) with respect to a Termination of Employment due to death or permanent disability, with respect to the partial Covered Quarter in which such Termination of Employment due to death or permanent disability occurs.

(Compl. Ex. 1 § 3.1.)

"Covered Quarter" is defined in the Profit Sharing Plan to mean "each calendar quarter (or portion thereof) as to which the Plan is in effect." (Compl. Ex. 1 p. 3.) Since there is no dispute that the Profit Sharing Plan was in effect for the entire third quarter of 2014, "Covered Quarter" here means the **entire** third quarter of 2014, not just a portion of it.

Mr. Gross concedes that his employment terminated during the third quarter of 2014 (Compl. ¶ 69), which means the "Covered Quarter preceding his . . . termination" is the **second** quarter of 2014. Because Mr. Gross does not allege that he was terminated "due to death or permanent disability," he alleges no contractual entitlement under the Profit Sharing Plan for a payment for a "partial Covered Quarter"—*i.e.*, the portion of the third quarter during which he remained a PIMCO employee. His participation in the Profit Sharing Plan thus terminated before he was eligible for a third quarter bonus. This dooms his claim. (*Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 523 ["eligibility for bonus payments is properly determined by the bonus plans' specific terms" and employee did not satisfy those terms]; *Lucian*, *supra*, 116 Cal.App.3d at 975 [bonus denied because the plan stated employees who voluntarily resigned would not be paid a share]; *Peterson v. California Shipbuilding Corp.* (1947) 80 Cal.App.2d 827, 831, emphasis in original [bonus denied because plan stated that only employees "'*as of the end of such pay roll year*'" were eligible].)

Contrary to the unambiguous language of the Profit Sharing Plan, Mr. Gross misconstrues "Covered Quarter" to mean the final **partial** calendar quarter during which a terminated participant remained employed by PIMCO. (See Compl. ¶¶ 99-102.) But the Plan expressly uses the phrase "partial Covered Quarter" to refer to that concept, not "Covered Quarter." (Compl. Ex. 1 § 3.1.) Under Mr. Gross's reading, the word "partial" in the phrase "partial Covered Quarter" would be superfluous. Moreover, Mr. Gross's interpretation cannot

be squared with the Plan's unambiguous distinction, in the course of a single sentence, between (a) a "Covered Quarter **preceding**" a termination, and (b) a "partial Covered Quarter **in which**" a termination occurs. (Compl. Ex. 1 § 3.1, emphasis added.) The Court should reject his misinterpretation because "contracts 'are construed to avoid rendering terms surplusage. [Citations.]'" (*Robolledo v. Tily's, Inc.* (2014) 228 Cal.App.4th 900, 923.)[5]

B. Mr. Gross Fails to Plead That He Had a Right to 20% of the Profit Sharing Pool or a "True Up."

Mr. Gross claims that under "the Plan, Mr. Gross was entitled to receive 20% of the entire profit sharing bonus pool each year" (Compl. ¶ 75), and to "a 'true up' of the previous quarters so that the total compensation Mr. Gross was to receive for 2014 was 20% of the bonus pool multiplied by the percentage of the year that he worked." (*Id.* ¶ 102.) Mr. Gross fails to allege a basis for these purported entitlements.

Section 3.2 of the Profit Sharing Plan states in part:

> Not later than the payment date for each Covered Quarter specified in Section 3.5, the Compensation Committee shall determine the Participation Percentages of the Participants for such Covered Quarter. The Participation Percentages for each Covered Quarter shall total 100%.

(Compl. Ex. 1 § 3.2.)

Thus, far from fixing a permanent share of the pool for Mr. Gross or anyone else, the Profit Sharing Plan unambiguously calls for PIMCO's Compensation Committee to determine the share for each participant on a quarter-by-quarter basis. This process gave the Committee discretion to fix the quarterly percentage for Mr. Gross at 0%. Indeed, Mr. Gross himself alleges that the Committee could decrease the most senior employee's share of the pool. (Compl. ¶ 42 [Mr. Gross asked the Committee to "deny [former CEO and co-CIO Mohamed El-Erian] a portion of his $50 million bonus for the first quarter of 2014"].)

[5] Mr. Gross's allegation that PIMCO's "usual custom and practice was to pay departing employees an appropriate share for partially completed quarters" is irrelevant. (Compl. ¶ 78.) It is well-established that "usage and custom will not be employed to vary the clear terms of an agreement or change their meaning when there is a specific contractual provision governing them." (*Edgar Rice Burroughs, Inc. v. Metro-Goldwyn-Mayer, Inc.* (1962) 205 Cal.App.2d 441, 449 (hereafter *Edgar Rice Burroughs, Inc.*).)

Mr. Gross alleges nothing that exempts him from the quarterly process for setting shares of the bonus pool. Because the Profit Sharing Plan specifies that any awards rest in the discretion of the Compensation Committee, Mr. Gross in any event cannot recover based on the exercise of that discretion—even if (contrary to fact) he had remained a participant in the Profit Sharing Plan for the third quarter of 2014.

In fact, Mr. Gross does not even allege that PIMCO had a practice of paying him a 20% share. Even if he alleged such a practice, "custom will not be employed to vary the clear terms of an agreement . . . when there is a specific contractual provision governing them." (*Edgar Rice Burroughs, Inc.*, *supra*, 205 Cal.App.2d at 449.) Moreover, practice alone cannot imply an unwritten obligation. (See *Sappington*, *supra*, 119 Cal.App.4th at 954-55 [twenty-year practice of defendant paying for healthcare did not give rise to implied contract term].)

III. MR. GROSS'S "IMPLIED COVENANT" CLAIM FAILS BECAUSE IT IS INCONSISTENT WITH THE WRITTEN CONTRACT TERMS ALLOWING TERMINATION AT ANY TIME WITHOUT CAUSE.

The Third Cause of Action of the Complaint is for breach of the implied covenant of good faith and fair dealing. Mr. Gross's first theory—that Defendants breached the covenant by terminating him "days before a substantial payment would have been . . . due and for the sole purpose of evading payment" (Compl. ¶ 107)—fails for two independent reasons. *First*, the Complaint does not adequately plead that Defendants compelled Mr. Gross to resign or controlled the timing of his resignation. (See *supra* Part I.B.) Defendants cannot be liable for Mr. Gross's voluntary decision to resign several days before he would have become eligible to participate in the third quarter profit sharing pool at a yet-to-be-determined level. *Second*, assuming *arguendo* that he had not resigned four days before the end of the quarter, Defendants would have had the right to end his employment then. As explained above in Part I.A.1, under the plain terms of the Company Agreement, PIMCO officers "may be removed at any time" and "without cause." (Fitzpatrick Decl. Ex. A § 9.5(a).) The Profit Sharing Plan itself expressly does not "give any Participant any right to continued employment." (Compl. Ex. 1 § 4.5.) Because no obligation of good faith and fair dealing "can be implied which

would result in the obliteration of a right expressly given under a written contract," Mr. Gross's first theory fails. (*Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806.)

Mr. Gross's second theory—that Defendants refused "to honor the clear terms contained" in the Profit Sharing Plan by not paying a third quarter bonus or a "true up" (Compl. ¶¶ 108-109)—fails because the Plan establishes that he did not have a right to a third-quarter bonus or a "true up" (see, *supra*, Parts II.A, II.B) and that PIMCO had complete discretion to make no payment to eligible employees. (See, *supra*, Part II.B.) PIMCO's exercise of its defined-in-writing contractual discretion cannot violate the covenant of good faith and fair dealing. (See *Brandt v. Lockheed Missiles & Space Co.* (1984) 154 Cal.App.3d 1124, 1130 [employer's denial of discretionary award to employee in accordance with terms of the written contract could not breach the covenant of good faith and fair dealing].)

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court sustain this demurrer without leave to amend. It is appropriate to sustain Defendants' demurrer without leave to amend because the unambiguous text of the terms of Mr. Gross's employment with PIMCO demonstrates the futility of Mr. Gross's claims. (See *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1387.)

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