UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEMOS PARNEROS,

Plaintiff and
Counterclaim Defendant,

- against -

BARNES & NOBLE, INC.,

Defendant and
Counterclaim Plaintiff.

No. 1:18-cv-07834 (MKV)

DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff's opposition papers fail to raise any triable issues of fact that would preclude dismissal of his defamation claim. Plaintiff cannot proceed to trial for one overarching reason: the purportedly defamatory statements made in B&N's July 3, 2018 press release ("Press Release") are entirely true. That is a complete defense to Plaintiff's defamation and defamation by implication claims. Plaintiff's assertion that his conduct did not constitute cause for termination does not create a triable issue on his defamation claim; he will have the opportunity to prove this assertion at trial on his breach of contract claim.

The defamation claim fails for two other reasons. Plaintiff has not cited a single case in which an employer was found to have been grossly irresponsible by making a statement following a company investigation. And, as we showed in our opening brief, Plaintiff's failure to plead special damages provides another reason for dismissing the defamation claim in advance of trial.

Finally, Plaintiff's good faith and fair dealing claim should be dismissed because Plaintiff cannot create obligations that are greater than—and here, inconsistent with—the parties' contract. To the extent that Plaintiff is now seeking to amend that claim in his opposition, it is both too late and barred by well-established case law requiring the dismissal of duplicative claims.

Based on the undisputed material facts and well-settled principles of law, partial summary judgment should be granted to B&N, winnowing the issues to be tried as contemplated by Rule 56.[1] The case should proceed to trial on the only claim that is truly at issue: whether B&N breached Plaintiff's employment agreement when it discharged him for cause in July 2018.

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[1] Plaintiff admits all but a few of (and all essential) facts in B&N's 56.1 Statement, adding improper caveats in his Response which attempt to manufacture disputes of fact (by interjecting legal argument, immaterial facts or characterizations), while failing to actually controvert the substance of the facts

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED ON PLAINTIFF'S DEFAMATION CLAIM

A. The Press Release Is Literally True

Nowhere in Plaintiff's opposition brief or 72-page Rule 56.1 statement does Plaintiff deny the truth of the Press Release. To the contrary, he admits that the B&N Board (the "Board") unanimously voted to terminate him for sexual harassment, bullying behavior, and his misconduct with respect to the Potential Transaction—and that B&N told him that he was being terminated for alleged violations of Company policies. 56.1 ¶¶ 80-81. Those admissions sound the death knell for Plaintiff's defamation claim; in the absence of falsity, a defamation claim will not lie. *See* B&N Br. 10-12.

The heart of Plaintiff's opposition—in which he attempts to prove that he did not in fact violate Company policies and should not have been discharged—is beside the point. Plaintiff's assertion that the Board was mistaken in determining that his conduct constituted

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asserted by B&N. *See, e.g.*, *Garvey* v. *Town of Clarkstown, N.Y.*, 13-cv-8305 (KBF), 2018 WL 1026379, at *1 n.2 (S.D.N.Y. Feb. 22, 2018), *aff'd sub. nom*, 773 F. App'x 634 (2d Cir. 2019). Plaintiff's voluminous Counter-Statement of Disputed Facts similarly fails to raise material disputed issues of fact. *See Quarles* v. *Gen. Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985) ("[T]he mere existence of factual issues—where those issues are not material to the claims before the court—will not suffice to defeat a motion for summary judgment."). Local Civil Rule 56.1 does not provide for a reply to Plaintiff's Counter-Statement, and thus, as contemplated by Rule 56, B&N's arguments as to those "disputed facts" are preserved for trial. Fed. R. Civ. Pro. 56(e) Advisory Note; *Garcia* v. *Vill. Red Rest. Corp.*, 15 Civ. 6292(RWL), 2018 WL 1166723, at *2-3 (S.D.N.Y. Feb. 15, 2018).

grounds for discharge for Cause may be relevant to his breach of contract claim, but it has no bearing on his defamation claim.

Indeed, Plaintiff has not cited a single case in which a court has allowed a plaintiff to proceed to trial when it has admitted the truth of the purportedly defamatory statements. The cases on which Plaintiff relies involve circumstances in which the party claiming to be defamed challenged the truth of the statement itself. For example, in *Meloff* v. *N.Y. Life Ins. Co*., 240 F.3d 138, 141-44 (2d Cir. 2001), the plaintiff challenged the truth of her employer's statement that she had "defrauded" the company. Similarly, in *Davis* v. *Ross*, 754 F.2d 80, 81-82, 86 (2d Cir. 1985), the plaintiff alleged that her employer's statement that she was fired because of inadequate work or personal habits was false, in light of the fact that she had voluntarily resigned. And, in *Yazurlo* v. *Bd. of Educ. of the City of Yonkers*, No. 17 Civ. 2027(NSR), 2018 WL 4572255, at *4-5 (S.D.N.Y. Sept. 24, 2018), the plaintiff challenged the truth of the statement that he had "watched [$2,300] worth of pornography on his computer at work and used a district credit card."[2] Here, Parneros may disagree with the employment decisions expressed in the B&N Press Release, but

[2] *Pisani* v. *Staten Island Univ. Hosp.*, No. 06-CV-1016(JFB)(MLO), 2008 WL 1771922 (E.D.N.Y. Apr. 15, 2008), is of no help to Plaintiff. There, the defendant hospital issued a press release stating that former executives had, in fact, engaged in "*unlawful* Medicaid reimbursements." *Id.* at *2, 5, 13 (emphasis added). The court denied defendant's motion for summary judgment, in part, because *defendant itself* had previously disavowed that misconduct had been committed. *Id.* at *18. *Compare with Pisani* v. *Westchester Cty. Health Care Corp.*, 424 F. Supp. 2d 710, 716-17 (S.D.N.Y. 2006) ("*Pisani II*") (dismissing defamation claim because press release "made only statements of unchallenged truth regarding plaintiff's [employment] status"—*i.e.*, that plaintiff was terminated for a particular reason).

he does not challenge, nor can he after admitting otherwise, that the Press Release accurately states what happened as a matter of corporate action. Parneros, unlike the plaintiffs in the cases cited above, cannot attack the truth of the B&N statements. The underlying merits of his termination are to be left for trial on his contract claim.

Plaintiff's fallback argument—that the Court should disregard the literal truth of the Press Release and instead consider how the Press Release may have been interpreted "in the context of the Me-Too movement"—is easily rejected. Opp. 10-11. The snippets from cases that Plaintiff cobbles together for this argument do not address falsity but, rather, whether a statement should be considered "defamatory"—a separate element for a defamation claim.[3]

B. Plaintiff's Defamation by Implication Claim Fails

Plaintiff's defamation by implication claim fails for the same reason: Even if, contrary to the plain language of the Press Release, the Court were to find that it could be reasonably read to imply that Plaintiff was fired for violating B&N's sexual harassment policy, that implication is, in fact, true and therefore cannot support any form of defamation claim. *See Martin* v. *Hearst Corp.*, 777 F.3d 546, 552-53 (2d Cir. 2015).

Plaintiff's brief simply elides that falsity is required to make out a claim for defamation by implication, just as it is for any other type of defamation claim. Although Plaintiff expends considerable energy attempting to show that the "average reader" would view the Press Release as accusing him of violating B&N's sexual harassment policy, Opp. 10-16, there is no

[3] *See, e.g.*, *Wexler* v. *Allegion (UK) Ltd.*, 374 F. Supp. 3d 302, 310 (S.D.N.Y. 2019) (discussing whether statement is "reasonably susceptible" to "defamatory" meaning); *Celle* v. *Filipino Reporter Enters. Inc.*, 209 F.3d 163, 178 (2d Cir. 2000) (same); *Mitre Sports Int'l Ltd.* v. *Home Box Office, Inc.*, 22 F. Supp. 3d 240, 252 (S.D.N.Y. 2014) (same); *see* B&N Br. 12 n.5.

dispute that violation of B&N's sexual harassment policy was, in fact, one of the three grounds for his termination. *See* 56.1 ¶¶ 68, 81. Indeed, had the Press Release expressly said that one of the reasons for Plaintiff's discharge was violation of the sexual harassment policy, no claim for defamation could lie because that statement is true; a true implication cannot sustain a defamation claim. *See, e.g.*, *Martin*, 777 F.3d at 552-53; *Biro* v. *Conde Nast*, 883 F. Supp. 2d 441, 468 (S.D.N.Y. 2012).

Furthermore, Plaintiff's defamation by implication claim cannot succeed for the additional reason that Plaintiff has failed to make the "rigorous showing" required by law. *See* B&N Br. 12-16. Plaintiff has not shown (and cannot show) that the plain language of the Press Release can be reasonably read to imply that he was fired for violating B&N's sexual harassment policy and that B&N intended to endorse that implication. *See Stepanov* v. *Dow Jones & Co*., 120 A.D.3d 28, 37-38 (1st Dep't 2014). The Press Release says nothing about which B&N policies were violated and it is simply not reasonable to read such an implication into the Press Release. Plaintiff's assertion that the Court should consider extrinsic evidence concerning speculation about the reason for his termination (such as deposition testimony, online comments, and news articles) is contrary to well-established law requiring the implication to arise from the plain language of the statement itself. *Id.*[4]

[4] Plaintiff incorrectly relies on *dicta* in *Agbimson* v. *Handy*, where the court held that the plain language of the statement demonstrated an "unmistakable" and "straightforward" implication, noting in *dicta* that deposition testimony "further bolstered" its conclusion. No. 17-CV-9252(WHP), 2019 WL 3817207, at *6-7 (S.D.N.Y. Aug. 14, 2019). Similarly, *Partridge* v. *State*, 173 A.D.3d 86, 93-95 (3d Dep't 2019), found a straightforward implication arising from a poster—which included plaintiff's

C. There Is No Evidence of Gross Irresponsibility

Although the literal truth of the Press Release alone requires dismissal of Plaintiff's defamation claim, dismissal is also warranted because Plaintiff has failed to meet his burden of showing disputed issues of fact demonstrating gross irresponsibility by B&N in issuing the Press Release. *Chapadeau* v. *Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975). Tellingly, Plaintiff has not cited a *single* case finding an employer to be grossly irresponsible in issuing a termination statement following a company investigation. *See* B&N Br. 16-20; Opp. 16-21.

Instead, Plaintiff seeks to re-litigate whether B&N's invocation of the attorney-client privilege should relieve him of his burden under the *Chapadeau* standard. Magistrate Judge Gorenstein rejected Plaintiff's arguments in ruling on his Motion to Compel:

> [F]airness does not require that Parneros have access to the attorney-client communications of Barnes & Noble both because Barnes & Noble bears no burden and because there is ample objective evidence that Parneros may use in his effort to meet the *Chapadeau* standard. Under plaintiff's proposed rule, any plaintiff in a defamation action subject to *Chapadeau* would automatically get any attorney-client communications that the defendant had with its attorney on the subject matter of the alleged defamatory statement.

Oct. 4, 2019 Order, ECF No. 132, at 32. *See also Alcor Life Extension Found.* v. *Johnson*, 43 Misc. 3d 1225(A), 2014 WL 2050661, at *11 n.4 (N.Y. Sup. 2014), *aff'd*, 136 A.D.3d 464 (1st Dep't 2016) (reference to consultation with counsel in defending against gross irresponsibility does not waive privilege).

Unable to cite to a single employer investigation case supporting his position, Plaintiff instead cites to a wholly different line of cases involving the news media. In the handful

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mugshot with photos of "internet criminals or sexual predators." Plaintiff's other implication cases were decided prior to *Stepanov*, which established the rigorous showing test. *See* Opp. 11, 14-16.

of cases he cites, courts found fact issues on gross irresponsibility when the publisher in the news gathering business did *nothing* to verify a source despite obvious reasons to doubt the source. Opp. 16-21.[5] Not only is the context of these cases completely inapt, but the undisputed facts here tell a far different story: Plaintiff was interviewed; he admitted and corroborated key portions of the Executive Assistant's complaint; there were multiple witnesses (B&N employees and others) to Plaintiff's other misconduct; and Board members received documentary evidence and spoke to witnesses prior to making their termination decision and issuing the Press Release.[6] B&N Br. 18-19; 56.1 ¶¶ 22-27, 32, 43-49, 59-62. None of Plaintiff's purported "disputed facts" comes close to discharging his burden to show (much less by the preponderance of the evidence that the law requires) that the Board was grossly irresponsible in issuing the Press Release.[7]

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[5] In *O'Brien* and *Ocean State Seafood* cited by Plaintiff (Opp. 19), employer investigations were not at issue, and plaintiffs were not interviewed before the statements were issued.

[6] While Plaintiff argues that certain B&N witnesses' notes are hearsay, the substance of their notes "could readily be reduced to admissible form at trial through . . . testimony," and thus, can be considered on summary judgment. *Smith* v. *City of New York*, 697 F. App'x 88, 89 (2d Cir. 2017). These notes also fall within other hearsay exclusions and exceptions. *See, e.g.*, Fed. R. Evid. 801(d)(1)(B), 803(1) & (3). Plaintiff's claim that B&N employees and Board members are "interested" witnesses whose testimony should be disregarded is also incorrect as a matter of law, *Frank* v. *State-Wide Ins. Co.*, 542 N.Y.S.2d 248, 249 (2d Dep't 1989), and, nevertheless, "does not in and of itself raise a genuine issue of material fact." *Chiaramonte* v. *Animal Med. Ctr.*, 677 F. App'x 689, 693 (2d Cir. 2017).

[7] For similar reasons, none of the "disputed" (and immaterial) facts asserted by Plaintiff supports a finding, by clear and convincing evidence, of actual or common law malice. Plaintiff fails to point to any evidence demonstrating that the Board knew or should have known that he did not commit the

D. The Press Release Was Not Defamatory *Per Se*, and Plaintiff Failed to Plead Special Damages

Plaintiff argues that his failure to plead special damages is not fatal to his defamation claim because the Press Release constitutes defamation *per se*. Opp. 23. Not so. New York courts have limited the scope of defamation *per se* to "matter[s] of significance and importance" which specifically discredit an employee in his "chosen calling." *See, e.g.*, *Aronson* v. *Wiersma*, 65 N.Y.2d 592, 594 (1985); *Kforce, Inc.* v. *Alden Pers., Inc.*, 288 F. Supp. 2d 513, 516-17 (S.D.N.Y. 2003). The Press Release does not state which policies were violated and does not allege any link between those unspecified policies and Plaintiff's performance or competence as a senior executive. Not even the implication alleged by Plaintiff constitutes defamation *per se.* *See Liberman* v. *Gelstein*, 80 N.Y.2d 429, 436 (1992) ("[I]t is not slanderous per se to claim that someone committed harassment.").

Because Plaintiff has not stated a claim for defamation *per se*, he must plead special damages. B&N Br. 20 n.12. He concedes (as he must) that he has not, pointing instead to interrogatory responses and a vague allegation in his Amended Complaint where he pleads no monetary loss. Opp. 22. This is insufficient. *See O'Keefe* v. *Niagara Mohawk Power Corp.*, 714 F. Supp. 622, 634 (N.D.N.Y. 1989) (dismissing tort claim on summary judgment for failure to plead special damages).

II. SUMMARY JUDGMENT SHOULD BE GRANTED ON PLAINTIFF'S BREACH OF COVENANT CLAIM

Plaintiff's original claim was that B&N breached the covenant of good faith and fair dealing by "firing plaintiff without cause just prior to the date defendant would have awarded

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misconduct for which he was terminated, or any evidence that the Board was motivated by a desire to injure Plaintiff. B&N Br. 20-22.

him an additional $3.6 million in equity." Am. Compl. ¶ 97. There is no such right under Plaintiff's employment contract: Plaintiff had no entitlement to future equity awards even if terminated without cause. 56.1 ¶¶ 6-8.

In his opposition brief, Plaintiff resorts to a new theory, based on the vesting of a previously granted tranche of equity worth $500,000. Opp. 27; Counter-Statement ¶ 89. Plaintiff cannot now change the theory of his claim. *See Lyman* v. *CSX Transp., Inc.*, 364 F. App'x 699, 701 (2d Cir. 2010). Nor, in any event, is Plaintiff's new theory viable. If terminated without cause, Plaintiff would be contractually entitled to accelerated vesting of certain outstanding unvested equity awards. Thus, the equity he now seeks would be included in his breach of contract damages, and Plaintiff's covenant claim must be dismissed as duplicative. *See, e.g.*, *Kamdem-Ouaffo* v. *Balchem Corp.*, No. 17-CV-2810(KMK), 2018 WL 4386092, at *19-20 (S.D.N.Y. Sept. 14, 2018).

CONCLUSION

B&N respectfully requests that the Court grant its partial summary judgment motion and dismiss Plaintiff's defamation and breach of the covenant of good faith and fair dealing claims.

Dated: New York, New York
February 12, 2020

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CERTIFICATE OF COMPLIANCE

Jay Cohen, a partner of Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys for Barnes & Noble, Inc., hereby certifies that the foregoing brief complies with all applicable formatting rules, including the Individual Practices of Judge John G. Koeltl, which applied at the outset of briefing. The total number of words in the foregoing brief, based upon the word count of the word-processing system used to prepare the brief, is 2,733.

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