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 (JGK)

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

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Tel: (212) 373-3000
Counsel for Defendant and Counterclaim Plaintiff
Barnes & Noble, Inc.

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PRELIMINARY STATEMENT

Plaintiff cannot proceed to trial on his defamation claim. After a Company investigation, the Board of Directors of Defendant and Counterclaim Plaintiff Barnes & Noble, Inc. ("B&N") unanimously voted to terminate Plaintiff and Counterclaim Defendant Demos Parneros ("Plaintiff" or "Parneros") for sexual harassment, bullying, and sabotaging a potential acquisition of the Company (the "Potential Transaction"). The Board then issued a true and accurate press release informing the public that Parneros had been terminated for "violations of the Company's policies." Plaintiff seeks to hold B&N liable for the consequences of his own misconduct by a strained and illogical reading of the press release—claiming that termination for "violations of Company policies" means termination for sexual harassment, but the undisputed facts show that Plaintiff's claim for defamation fails as a matter of law.

First, the so-called defamatory statements at issue—the statements in B&N's July 3, 2018 press release ("Press Release") announcing his termination—are all literally true. Plaintiff himself admits the truth of these statements. This is the death knell for Plaintiff's defamation claim. Plaintiff's alternative claim for defamation by implication—that the Press Release implies that he was terminated for sexual harassment—fails because Plaintiff cannot meet his evidentiary burden on this summary judgment motion of showing that the Press Release clearly imparts or was intended to impart that implication to the exclusion of other non-defamatory implications. To the contrary, the Press Release—which refers simply to violations of Company policies—makes no mention of sexual harassment, can be fairly interpreted as suggesting any number of other policy violations and, therefore, cannot support a claim for defamation by implication. Plaintiff cannot survive summary judgment on his defamation claim by simply inventing an implication; if he could, there would be no limit to a doctrine that the courts have recognized to be a narrow one.

Second, the undisputed facts negate any finding of fault by B&N as a matter of well-established Second Circuit law. Plaintiff cannot show that B&N acted in a "grossly irresponsible manner." Plaintiff has not cited a single case—nor are we aware of any—in which a court found a statement made in reliance on an employer's investigation to be grossly irresponsible. Rather, numerous New York courts have dismissed defamation claims as a matter of law for failure to meet the "grossly irresponsible" standard of fault. The undisputed evidence demonstrates that B&N conducted a thorough and responsible investigation into Plaintiff's misconduct and that, prior to the Board's unanimous vote to terminate, it engaged in meaningful discussion, considered its decision over several days, and both senior management and the Board reviewed the Press Release before it was issued.

Third, there is no evidence supporting Parneros's claims for special, presumed, or punitive damages. To the extent Plaintiff asserts a separate claim for libel (as distinct from libel *per se*), that claim must be dismissed for failure to plead special damages. Indeed, Plaintiff does not dispute that he has failed to plead such damages. Additionally, both federal constitutional and New York law prohibit recovery of any presumed or punitive damages without a showing of actual or common law malice. The record is devoid of any material facts showing such conduct by the Company.

Plaintiff's claim for breach of the covenant of good faith and fair dealing is similarly flawed as a matter of law. He asserts, based on the purely speculative assertion, that B&N fired him to avoid making an equity grant. There is no evidence, however, that the decision to terminate Plaintiff for sexual harassment, bullying and undermining the Potential Transaction had anything at all to do with Plaintiff's equity award. The record instead shows that the timing of Plaintiff's termination was determined by the timing of Plaintiff's misconduct. And Plaintiff

had no contractual entitlement to an equity grant upon termination, whether fired for or without Cause. More than mere speculation is required to survive summary judgment on this claim.

STATEMENT OF FACTS[1]

A. Parneros Is Hired and then Promoted

On November 17, 2016, B&N hired Parneros as its Chief Operational Officer ("COO"). (B&N 56.1 ¶ 1.) Thereafter, on April 27, 2017, Parneros was promoted to CEO, reporting to B&N's Board of Directors, and became a Board Director. (*Id.* ¶ 2.) Parneros's employment agreement, as amended, provides for termination for "Cause."[2] (*Id.* ¶ 3.)

B. An Executive Assistant Complains about Parneros's Conduct in May 2018

On May 17, 2018, Parneros commented to an Executive Assistant about her height and moved behind her to stand back-to-back to compare heights such that their shoulders were touching. (Keane Decl., Ex. A, EA Dep. 198:20-200:22). As Parneros moved away, he pinched her neck. (*Id.*) The Executive Assistant viewed his conduct as inappropriate. (*Id.* 200:23-201:5).

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[1] Citations to "B&N 56.1" refer to the Statement of Undisputed Facts filed in support of this motion pursuant to Local Rule 56.1. Citations to "Am. Compl." refer to Plaintiff's Amended Complaint dated Oct. 12, 2018. Citations to "Keane Decl." refer to the exhibits attached to the Declaration of Maria H. Keane. As demonstrated in the Argument section, the facts relevant to Plaintiff's claims for defamation and breach of the covenant of good faith and fair dealing are not subject to reasonable dispute. Any of the facts that are in dispute do not bear on the adjudication of these two claims.

[2] Parneros's employment agreement, as amended, defines "Cause" as including, *inter alia*, "your willful failure or refusal to properly perform the duties, responsibilities or obligations of your employment for reasons other than Disability or authorized leave, or to properly perform or follow any lawful direction by the Company" or "your material breach of this Agreement or of any other contractual duty to, written policy of, or written agreement with the Company." (B&N 56.1 ¶ 4.)

Five days later, after the Executive Assistant's return from a short vacation (*see id.* 176:12-18, 211:25-212:15), Parneros asked her about her trip and showed her pictures from Quebec hotel websites on his computer, describing one as "quaint," "charming," and "romantic," that "put[s] you in a good mood" or "in the right mood." (B&N 56.1 ¶¶ 10-12.) Parneros then stood up from his computer, pulled her in close so that their cheeks touched, at which point she pulled away, and he sat down and angrily told her that "she look[ed] like the kind of girl who if [he] wined and dined would put out after that." (Keane Decl., Ex. A, EA Dep. 216:14-218:16, 224:5-12.) The Executive Assistant's account is recorded in contemporaneous and other notes. (B&N 56.1 ¶¶ 13-14.) She also reported the incidents promptly to B&N's CFO, Al Lindstrom. (*Id.* ¶ 15.)

C. B&N Begins an Investigation into Parneros's Misconduct

Upon learning of the incidents, B&N's General Counsel, Brad Feuer, immediately launched an investigation. (*Id.* ¶¶ 16-17.) He met with the Executive Assistant on May 24, 2018, the day after she reported the incidents to Lindstrom. (*Id.* ¶ 18.) Feuer requested that Mary Ellen Keating, one of B&N's highest ranking executives, assist with the investigation. (*Id.* ¶ 19.)

On May 30, 2018, B&N Chairman Len Riggio and Keating met with the Executive Assistant, who relayed her allegations to them. (*Id.* ¶¶ 21-23.) Both Riggio and Keating found the Executive Assistant to be credible. (Keane Decl., Ex. H, Keating Dep. 195:7-13; Keane Decl., Ex. I, Riggio Dep. 191:5-192:3.)

In late May or early June 2018, Riggio met with Parneros and informed him of the allegations the Executive Assistant had made against him. (B&N 56.1 ¶ 22.) Specifically, Riggio told Parneros that the Executive Assistant claimed he had inappropriately touched her face and had told her that she seemed like someone who would "put out." (*Id.* ¶ 25.) Notes taken by Parneros reflect that Riggio described the allegations against him using the phrases "put out," "said

romantic place," "puts you in the right mood," "face touching?," "back to back," and the "Board will need to be involved." (*Id.* ¶ 26.) Parneros admitted that he described the Quebec hotel to the Executive Assistant as a "romantic place" that "puts you in a good mood" or "the right mood," but he denied (and continues to deny) touching the Executive Assistant or saying that she would "put out." (*See id.* ¶ 27; Keane Decl., Ex. B, Parneros Dep. 14:22-23, 19:12-14.) He claims that there was only one incident and that the comparison of heights was "shoulder-to-shoulder", not back-to-back. (B&N 56.1 ¶ 24; Keane Decl., Ex. B, Parneros Dep. 13:16-15:12, 21:18-25.) After hearing from both sides, Riggio and Keating each believed the Executive Assistant's allegations were true. (Keane Decl., Ex. I, Riggio Dep. 218:25-219:7; Keane Decl., Ex. H, Keating Dep. 195:7-17.) Keating testified that she did not find Parneros credible. (Keane Decl., Ex. H, Keating Dep. 195:14-17.) Keating and Riggio reported their conclusions to Feuer. (B&N 56.1 ¶ 29.) Prior to the June 27 Board meeting, several Board members discussed the sexual harassment allegations with B&N executives involved in the investigation. (*Id.* ¶¶ 30-31.)

D. The CFO Complains about His Treatment by Parneros

The bullying charges against Parneros stem from the claim by Al Lindstrom, the CFO, and a direct report of Parneros, that Parneros mistreated and bullied him over the course of Parneros's tenure at B&N. Lindstrom's claim of mistreatment is corroborated by the testimony of several other executives. (*See, e.g.*, *id.* ¶ 32.)

Lindstrom sent a self-evaluation to Parneros and HR on May 28, 2018, directly complaining about Parneros's bullying behavior. (*Id.* ¶ 35.) Lindstrom wrote, "I am frequently berated by my supervisor in front of others at meetings, and in one instance my schedules were actually thrown on the floor. My supervisor has turned his back on me at meetings, and openly complains about finance in front of the team. . . . I feel bullied and find this behavior both unprofessional and unproductive." (*Id.*) Lindstrom provided Feuer a copy of his self-evaluation.

(*Id.* ¶ 36.) Lindstrom's self-evaluation was shared with the Board prior to the June 27, 2018 meeting at which the Board decided to terminate Parneros. (*Id.* ¶ 38.) Prior to making his formal complaint on May 28, Lindstrom raised his concerns with several Board members. (*Id.* ¶ 34.) Riggio also spoke directly with Lindstrom and other B&N executives about Lindstrom's complaint prior to the Board meeting. (*Id.* ¶ 37.)

E. Several Witnesses Complain about Parneros's Conduct at the June 18 Meeting with the Potential Acquiror

In early 2018, a company (the "Potential Acquiror") expressed interest in pursuing the Potential Transaction. (Keane Decl., Ex. B., Parneros Dep. 196:17-20; Keane Decl., Ex. C, Feuer Dep. 229:8-24.) At the May 15, 2018 and May 30, 2018 Board meetings, the Board instructed Parneros to move forward to attempt to consummate the Proposed Transaction. (B&N 56.1 ¶¶ 39-41.)

Leading up to a critical meeting on June 18, 2018, the Potential Acquiror emphasized to Parneros the importance of the meeting and the need for Parneros to deliver an explanation of B&N's recent sales decline and whether the sales issues were temporary and fixable. (*Id.* ¶ 42.) In the judgment of the Potential Acquiror, Parneros failed to do so. (*Id.* ¶ 52.) B&N senior executives and the CEO of the Potential Acquiror have testified that, rather than providing the requested explanation, Parneros instead was openly negative about the business, claiming that if sales continued to decline at the current rate, B&N would go bust in two years. (Keane Decl., Ex. L, PA Dep. 126:8-127:5, 129:5-8, 131:25-132:25, 140:16-141:16, 143:9-12; Keane Decl., Ex. K., Hauch Dep. 45:25-48:22; Keane Decl., Ex. D, Lindstrom Dep. 368:14-370:15; Keane Decl., Ex. C, Feuer Dep. 378:22-383:16.) Although Parneros denies he made such statements (*see, e.g.*, Keane Decl., Ex. JJ, RFA Response No. 56), his denial is not only contradicted by the testimony of the other attendees but also by the contemporaneous notes of

three B&N executives. (*See* B&N 56.1 ¶¶ 44-49.) The very next day, June 19, 2018, the Potential Acquiror withdrew from the deal. (*Id.* ¶¶ 50-51.) Riggio spoke directly with Carl Hauch (VP of Stores), Lindstrom, and Tim Mantel (Chief Merchandising Officer), who witnessed Parneros's misconduct at the June 18 meeting, prior to the Board meeting at which the determination was made to terminate Parneros. (*Id.* ¶ 51.)

F. The Board Makes an Informed Decision to Terminate Parneros

On June 27, 2018, the B&N Board convened for a special meeting. (B&N 56.1 ¶ 58.) Several Board members had spoken with B&N executives, including Feuer, about the allegations against Parneros in advance of the meeting. (*Id.* ¶¶ 60-62.) Before the meeting, the Board also received an email in which a senior executive of the Company described Parneros's conduct at the June 18 meeting with the Potential Acquiror and an excerpt of Lindstrom's self-evaluation. (*Id.* ¶ 59.)

At the June 27 meeting, attended by Feuer, Riggio outlined the key facts concerning the Executive Assistant's sexual harassment complaint, Parneros's behavior toward Lindstrom, and his conduct with respect to the Potential Transaction. (*Id.* ¶¶ 64-65) Riggio reported the results of the investigation into the sexual harassment complaint, informed the Board that Parneros disputed the allegations and denied wrongdoing, and told the Board that he believed the Executive Assistant to be credible. (Keane Decl., Ex. G, Ferrara Dep. 269:10-272:3; Keane Decl., Ex. E, Van Der Zon Dep. 250:4-14, 253:3-255:20; Keane Decl., Ex. F, Guenther Dep. 222:10-224:8.) The Board discussed the issues, deliberated, and then unanimously voted to terminate Parneros for Cause when he returned from vacation the following week for three reasons: (1) sexual harassment, (2) bullying behavior, and (3) his conduct in undermining the Potential Transaction.

(B&N 56.1 ¶¶ 67-68.)[3] On June 29, Feuer called each Board member to confirm the vote in favor of termination. (*Id.* ¶ 69.) Because Parneros was terminated for Cause, he received no severance and his outstanding equity was cancelled. (*See id.* ¶¶ 6.) This was consistent with what his contract provided. (*See* Keane Decl., Ex. N, Pl. 001887 at -1888-1889.)

Following a unanimous vote by the Board, the Company terminated Parneros's employment on July 2, 2018. (*See* B&N 56.1 ¶¶ 67, 75, 80.) At the time of his termination, Parneros had not yet received that year's equity grant. His employment agreement provides that he "shall be granted Company equity awards or equity-based awards with an aggregate grant date value equal to 300% of your Annual Base Salary," but if terminated either for Cause or without Cause, he is not entitled to such grants. (*Id.* ¶¶ 5, 7-8.) The governing Amended and Restated Incentive Plan states that terminated employees do not "have any claim to be granted any Award under the Plan." (*Id.* ¶ 8.) There is no evidence that the topic of any impending equity award was discussed by the Board and or that it played any role in the Board's decision to terminate. (*Id.* ¶ 76.)

G. The Board Reviews and Approves the Press Release

On July 3, 2018, B&N issued a press release announcing Parneros's termination, which stated:

> The Board of Directors of Barnes & Noble, Inc. today announced the termination of its Chief Executive Officer, Demos Parneros, for violations of the Company's policies. This action was taken by the Company's Board of Directors who were advised by the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP. Mr.

[3] Parneros's conduct violated B&N's Core Values of respect, empathy, integrity, and teamwork, its Code of Business Conduct and Ethics requiring employees to treat each other with respect, its policy against sexual harassment, and his contractual duties to B&N. (B&N 56.1 ¶¶ 53-57; *see* Keane Decl., Ex. N.) The relevant text of these policies are set out in B&N's 56.1 statement.

> Parneros' termination is not due to any disagreement with the Company regarding its financial reporting, policies or practices or any potential fraud relating thereto. Mr. Parneros will not receive any severance payment and he is no longer a member of the Company's Board of Directors. (*Id.* ¶ 77.)

Parneros has admitted that these statements are true. (*Id.* ¶¶ 80-85.)

Prior to its issuance, the Press Release went through several rounds of review, including review by Feuer, Keating, Andy Milevoj (VP of Investor Relations), and the Board. (*Id.* ¶ 78.) As Board Member Al Ferrara testified, the wording was carefully considered and a decision was made to state the reason for termination as "violations of the Company's policies," rather than specifically mentioning sexual harassment as one of the termination reasons. (B&N 56.1 ¶ 79.) While earlier drafts of the Press Release contained a reference to sexual harassment, that reference was removed and not included in the final Press Release. (*Id.*) The first time that the detailed reasons for Parneros's termination—including sexual harassment—were made public was when Plaintiff filed his complaint on August 28, 2018. (*Compare* B&N 56.1 ¶ 77 *with* Keane Decl., Ex. GG, Am. Compl. ¶¶ 57-66.)

ARGUMENT

I. LEGAL STANDARD

Summary judgment is warranted when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56). When the non-moving party bears the ultimate burden of proof at trial on an issue, the moving party's initial burden of production under Rule 56 is discharged by "pointing out . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. To avoid the entry of summary judgment, the opposing party must come forward with specific facts that demonstrate the existence of issues which must be decided by a

fact-finder. *Id.* at 323-325; *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252-57 (1986); *Thompson* v. *Gjivoje*, 896 F. 2d 716, 720 (2d Cir. 1990).

II. PLAINTIFF'S DEFAMATION CLAIM FAILS AS A MATTER OF LAW

Parneros's claims for both defamation and defamation *per se* are premised solely on the Press Release. (Keane Decl., Ex. GG, Am. Compl. ¶¶ 48, 52, 89-90.) Parneros's claims fail as a matter of law. Under New York law, in order to succeed on a defamation claim, a plaintiff must show: (1) a defamatory statement of fact concerning the plaintiff; (2) falsity of the statement; (3) publication to a third party by the defendant without authorization or privilege; (4) some degree of fault on the part of the publisher; and (5) defamation *per se* or special damages. *See Thai* v. *Cayre Grp. Ltd.*, 726 F. Supp. 2d 323, 329 (S.D.N.Y. 2010); *Ratajack* v. *Brewster Fire Dep't, Inc. of the Brewster Se. Joint Fire Dist.*, 178 F. Supp. 3d 118, 158 (S.D.N.Y. 2016). As discussed below, there is no triable issue as to falsity, fault, or damages, and therefore summary judgment dismissing the defamation claim is warranted here.

A. The Press Release Is True.

"To survive summary judgment, [P]laintiff must [be] able to show that the statements complained of are false." *Bloom* v. *Fox News of Los Angeles*, 528 F. Supp. 2d 69, 75 (E.D.N.Y. 2007); *Tannerite Sports, LLC* v. *NBCUniversal News Grp.*, 864 F.3d 236, 247 (2d Cir. 2017) (holding that a defamation plaintiff has the burden of proving "falsity"). It is impossible for Plaintiff to make such a showing because he *admits* that the Press Release is true.

Truth is the "ultimate defense to defamation." *Bloom*, 528 F. Supp. 2d at 75. Here, Parneros admits the literal truth of the factual statements in the Press Release. *First*, Parneros admits that he was terminated "for violations of the Company's policies." (*See* B&N 56.1 ¶ 81.) *Second*, Parneros admits that the decision was "taken by the Company's Board of Directors," and it is undisputed that the Board was "advised by [Paul, Weiss]." (*Id.* ¶¶ 80, 82.) *Third*, Parneros

admits that the decision was not "due to any disagreement with the Company regarding its financial reporting, policies or practices or any potential fraud relating thereto." (*Id.* ¶ 83.) *Fourth*, Parneros admits that he did not receive any severance payment. (*Id.* ¶ 84.) *Fifth*, Parneros admits that he was "no longer a member of the Company's Board of Directors" after his termination. (*Id.* ¶ 85.) The record corroborates each of Plaintiff's admissions. (*See, e.g.*, *id.* ¶¶ 65-74; Keane Decl., Ex. F, Guenther Dep. 276:2-17, 277:24-278:3; Keane Decl., Ex. N, Pl. 001887 at -001887; Keane Decl., Ex. M, Pl. 001873 at -1873.)[4]

Because the truth of each factual statement in the Press Release is undisputed, as a matter of law, Plaintiff's defamation claim fails and summary judgment is warranted. *See, e.g.*, *Weber* v. *Multimedia Entm't, Inc.*, No. 97 Civ. 0682 (JGK), 2000 WL 526726, *10 (May 2, 2000) (Koeltl, J.) (on summary judgment, dismissal of defamation claim was warranted because statements were substantially true); *Dillon* v. *City of New York,* 261 A.D.2d 34, 39-40 (1st Dep't 1999) (same); *Bloom*, 528 F. Supp. 2d at 76 (same); *Silverman* v. *Clark*, 35 A.D.3d 1, 12-14 (1st Dep't 2006) (same); *see also Chau* v. *Lewis*, 771 F.3d 118, 129-30 (2d Cir. 2014) (affirming summary judgment dismissing defamation claim based on substantial truth); *Tolbert* v. *Smith*, 790 F.3d 427, 439-40 (2d Cir. 2015) (same); *Tannerite*, 864 F.3d at 247 ("[O]utside material may be

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[4] Indeed, it is undisputed that at the June 27, 2018 Board meeting, Riggio explained the key facts concerning the allegations of sexual harassment, bullying, and sabotage of the Potential Transaction that had been raised against Parneros, and the Board subsequently voted to terminate him for Cause. (B&N 56.1 ¶¶ 65-68.) The Board members who were deposed also testified that they understood Parneros's conduct to constitute violations of Company policy and/or to be a breach of fiduciary duty. (*Id.* ¶¶ 70-74.)

presented by the defendant at summary judgment so the court may determine whether a legitimate question exists as to its truth or falsity.”).[5]

B. Plaintiff's Defamation by Implication Claim Fails.

Plaintiff argues alternatively that the Press Release is defamatory by implication because it implies that Parneros was fired for violating the Company's sexual harassment policy. (Pl. Oct. 30 Ltr. 1-2.) Defamation by implication is a narrow doctrine that has no application here. *See, e.g.*, *Martin* v. *Hearst Corp.*, 777 F.3d 546, 552-53 (2d Cir. 2015) (dismissing, on summary judgment, defamation by implication claim because statement implying plaintiff had been arrested was historically true despite subsequent expungement of arrest record); *Goldman* v. *Barrett*, No. 15 Civ. 9223 (PGG), 2016 WL 5942529, at *6 (S.D.N.Y. Aug. 24, 2016) (“This Court will not give the [statement] a strained or artificial construction in order to find such a defamatory implication” (internal quotations omitted).).

Parneros cannot make a rigorous showing that the Press Release clearly implies or was intended to imply that he was terminated for sexual harassment. Courts typically dismiss defamation by implication claims unless a plaintiff makes a “rigorous showing” that the statement can be reasonably read both “[1] to impart a defamatory inference and [2] to affirmatively suggest

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[5] Plaintiff mistakenly attempts to rely on case law holding that a plaintiff can satisfy the “defamatory” element of a defamation claim by looking to the “whole apparent scope and intent of the writing.” *See* Pl. Oct. 30 Ltr. 1 (citing *Celle* v. *Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 177 (2d Cir. 2000)); *see also Aronson* v. *Wiersma*, 65 N.Y.2d 592, 593-94 (1985)). New York courts have soundly rejected the argument that the “overall impact” of a statement can state a claim for defamation. *See Biro* v. *Conde Nast*, 883 F. Supp. 2d 441, 482 (S.D.N.Y. 2012) (the “overall impact” of a publication “does not in itself constitute a cause of action because the defamatory impact of the publication is the same as the defamatory implication conveyed by each of its individual statements” (quotations omitted and citing *Herbert* v. *Lando*, 781 F.2d 298, 307 (2d Cir. 1986)).

that the author intended or endorsed that inference." *Stepanov* v. *Dow Jones & Co.*, 120 A.D.3d 28, 37-38 (1st Dep't 2014) (affirming dismissal of defamation by implication claim on motion to dismiss); *Udell* v. *NYP Holdings, Inc.*, 169 A.D.3d 954, 957 (2d Dep't 2019) (same); *see also Kavanagh* v. *Zwilling*, 997 F. Supp. 2d 241, 248, 254-55 (S.D.N.Y. 2014), *aff'd*, 578 F. App'x 24 (2d Cir. 2014) (same).

The Press Release does not reasonably impart a defamatory inference that Parneros was terminated for sexual harassment. It says nothing about which B&N policies were violated. (*See* B&N 56.1 ¶ 77.) It does not mention sexual harassment, and it is no more suggestive of an inference that Plaintiff violated the sexual harassment policy than one of many other Company policies that could have led to Plaintiff's termination. The plain language of the Press Release states only "violations of Company policies," and a deliberate decision was made not to make any reference to sexual misconduct. (*Id.* ¶ 77, 79.) Indeed, Barnes & Noble's Code of Conduct found in its Employee Handbook provides a number of policies that, if violated, could have led to Parneros's discharge, including but not limited to, undisclosed conflicts of interest, acceptance of improper gifts, discrimination, harassment, failure to show respect and consideration to colleagues, falsifying expense reports, disclosure of confidential information, or use of B&N assets for political or other improper purposes. (*Id.* ¶ 57.) There is no reasonable basis to read "violations of Company policies" as implying that sexual harassment was at issue and not any one of these multiple other grounds for termination.

Because defamation by implication is a narrow doctrine, courts recognize that the defamatory implication cannot be "strained" or "artificial." *Goldman*, 2016 WL 5942529, at *6.[6]

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[6] Plaintiff cites *Agbimson* v. *Handy*, No. 17-CV-9252, 2019 WL 3817207, *6-7 (S.D.N.Y. Aug. 14, 2019), to support his defamation by implication claim. But the Press Release is nothing like the statements at issue in

If the statement complained of is "equally suggestive" of defamatory and non-defamatory inferences, the implied defamation claim fails as a matter of law. *See Wilson* v. *New York*, No. 15-CV-23 (CBA) (VMS), 2018 WL 1466770, at *5 (E.D.N.Y. Mar. 26, 2018).

Here, even the most liberal reading of the Press Release (from Parneros's perspective), makes clear that it does not implicate sexual harassment. Plaintiff points to a handful of reports in his Amended Complaint and cites to one witness's testimony in his pre-motion letter in an attempt to convince the Court otherwise. But the sources that Plaintiff cites in support of his claim (*see* Keane Decl., Ex. GG, Am. Compl. ¶ 52) prove the point that the Press Release is not fairly read as implicating sexual harassment. The *Washington Post* article, for example, that Plaintiff points to states: "Whether the violations in question were about nepotism, conflicts of interest, sexual harassment or some other unknown policy is unclear from the announcement." (Keane Decl., Ex. HH, Pl. 001599–Pl. 001601; Keane Decl., Ex. GG, Am. Compl. ¶ 52(b).) Other reports are in fact devoid of even speculation that sexual harassment led to Plaintiff's discharge. (*See* Keane Decl., Ex. HH, Pl. 001592–Pl. 001598; Keane Decl., Ex. GG, Am. Compl. ¶¶ 52(a) & (e).) And the lone online post relied upon by Plaintiff that affirmatively speculates as to whether the reason was sexual harassment acknowledges that the Press Release "leaves an awful lot of

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Agbimson. There, as the court noted, the implications were "unmistakable" and "straightforward." *Id.* at *6-7. The statement at issue outlined "numerous problems stemming from [plaintiff's] accounting practices, including failure to file tax documents, financial 'irregularities,' and 'abuse of company assets for personal gain,'" in addition to noting that the plaintiff "declined to turn over control of an account" and a demand that the plaintiff "'surrender' any funds 'immediately.'" *Id.* at *7. Such details, the court held, created a clear and straightforward implication as to the plaintiff's "rectitude as an accountant." *Id.* at *6-7. There are no facts in this case that come close to the showing in *Agbimson*.

wiggle room."[7] (*See* Keane Decl., Ex. HH, Pl. 001602–Pl. 001605; Keane Decl., Ex. GG, Am. Compl. ¶ 52(c).) Far less wiggle room is required to go to trial on a claim of defamation by implication.[8] If such bare speculation—either in online posts or in testimony from one witness—were sufficient to state a claim, then the narrow doctrine of defamation by implication would expand defamation law and a plaintiff could go to trial on virtually any statement at all.

Parneros also cannot make the requisite rigorous showing that B&N affirmatively intended or endorsed any implication that Parneros was terminated for sexual harassment. This is an objective inquiry based on the "plain language" of the statement itself. *See Stepanov*, 120 A.D.3d at 37.[9] There is nothing within the four corners of the Press Release that supplies

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[7] Plaintiff also cites to a selection of online comments (some anonymous). Some comments speculate as to sexual harassment (notably, one of those comments is written by the same person as the internet post) and other comments speculate that he was terminated for "something relatively minor and not legally actionable." (*See* Keane Decl., Ex. HH, Pl. 001606–Pl. 001616; Keane Decl., Ex. GG, Am. Compl. ¶ 52(d).)

[8] To the extent that Plaintiff is claiming that the Press Release implies that he engaged in "serious sexual misconduct" (*see* Keane Decl., Ex. GG, Am. Compl.¶¶ 2, 48, 52), such an implication is even more strained and artificial. *See*, *Goldman*, 2016 WL 5942529, at *6. There is nothing on the face of the Press Release or the context in which it was issued that would connect the words "violations of Company policies" to "serious sexual misconduct." Those words "serious sexual misconduct" are vague, unspecified, and not mentioned in the Company's Employee Handbook.

[9] In his pre-motion letter, Plaintiff relies on *Keough* v. *Texaco, Inc.*, No. 97 Civ. 5981 (LMM), 1999 WL 61836 (S.D.N.Y. Feb. 10, 1999), which was decided prior to *Stepanov* and applies the wrong standard to defamation by implication claims. Notably, *Keough* held that the question of whether the defendant "affirmatively intended to endorse" the defamatory inference turned on the defendant's subjective intent. *Id.* at *7. Subsequent New York

additional, affirmative evidence to support Plaintiff's theory that B&N intended to suggest sexual harassment as opposed to any other policy violation. In fact, the record demonstrates the opposite—that the Board made an affirmative decision to describe his termination as due to "violations of Company policies" and to not refer in any way to sexual harassment. (*Id.* ¶¶ 77, 79.) Plaintiff's defamation by implication claim fails for another reason as well: any such purported implication is true. In fact, on July 2, 2018, Plaintiff was terminated for violating the Company's sexual harassment policies. That is a "historical truth," and thus Plaintiff cannot demonstrate falsity. *See, e.g., Martin*, 777 F.3d at 552-553. "A statement may significantly harm a plaintiff's reputation, but if it is not alleged to be a false statement of fact, it is not actionable as defamation." *Biro*, 883 F. Supp. 2d at 468.

C. Plaintiff Cannot Meet His Burden on Fault.

New York law recognizes a qualified privilege for statements like the Press Release. *Chapadeau* v. *Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975).[10] Under *Chapadeau*, Plaintiff must show that B&N, in publishing the Press Release, "acted in a grossly

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case law, such as *Stepanov*, have elaborated that the inquiry is objective and does not rely on subjective intent whatsoever.

[10] What constitutes a matter of public concern is a question of law. *Mott* v. *Anheuser-Busch, Inc.*, 910 F. Supp. 868, 874 (N.D.N.Y. 1995). It is clear that the decision of the Board to terminate Parneros was within the sphere of legitimate public concern. Parneros was the CEO of a well-known public company, and his departure was of significant interest to B&N shareholders and the public. *See, e.g.*, *Konikoff* v. *Prudential Ins. Co. of America*, 234 F.3d 92, 94, 102 n.9 (2d Cir. 2000); *J&J Sheet Metal Works, Inc.* v. *Picarazzi*, 793 F. Supp. 1104, 1112-13 (N.D.N.Y. 1992). Further, Parneros's departure was both newsworthy and covered by multiple news agencies. *See, e.g.*, Keane Decl., Ex. HH, Pl. 001596-Pl. 001597; *Mott*, 910 F. Supp. at 874; *Ratajack*, 178 F. Supp. 3d at 169-70; *Post* v. *Regan*, 677 F. Supp. 203, 208 (S.D.N.Y. 1988).

irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" to have an actionable claim.[11] *Chapadeau*, 38 N.Y.2d at 199. *See also Weber*, 2000 WL 526726, at *10-11 (Koeltl, J.) (dismissing plaintiff's defamation claim on summary judgment because allegedly defamatory statements were substantially true and defendants did not act in a grossly irresponsible manner). Plaintiff cannot meet that high burden here.

Applying *Chapadeau* in circumstances similar to those here, numerous New York courts have found, on summary judgment, "that the company's reliance on a thorough, responsible investigation negated the existence of gross irresponsibility as a matter of law." *Kamfar* v. *New World Rest. Grp., Inc.*, 347 F. Supp. 2d 38, 47-48 (S.D.N.Y. 2004) (chairman not grossly irresponsible in stating that a former executive had received unauthorized bonuses because counsel had "conducted an extensive investigation"). *See also Post* v. *Regan*, 677 F. Supp. 203, 209 (S.D.N.Y. 1988) (employer not grossly irresponsible in making statements regarding plaintiff's termination because company investigation was "not done hastily" and "involved interviews of relevant parties and reviews of transactions and documents by inside and outside counsel, by staff and independent accountants, as well as by senior management"), *aff'd*, 854 F.2d 1315 (2d Cir. 1988); *Mott*, 910 F. Supp. at 875-76 (announcement regarding employee's termination was not grossly irresponsible because counsel-led investigation was commenced immediately after reports

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[11] This inquiry does not turn on the ultimate veracity of the statement at issue, but rather on whether the publisher acted in a grossly irresponsible manner. *See, e.g.*, *Chapadeau*, 38 N.Y.2d at 197; *Visentin* v. *Haldane Cent. Sch. Dist.*, 4 Misc. 3d 918, 922 (Sup. Ct. Putnam Cty. 2004). Thus, even if the Press Release were false (which it is not), as *Visentin* and *Chapadeau* instruct, the Court can still grant summary judgment on the sole ground that B&N did not act in a grossly irresponsible manner.

of wrongdoing and the statement supported the investigation findings). We are not aware of a single case in which a court found that a statement made in reliance on the employer's investigation was grossly irresponsible.

First, B&N reasonably relied on the investigation's findings that Parneros had sexually harassed the Executive Assistant. (B&N 56.1 ¶¶ 16-31.) The investigation, coordinated by Feuer, was thorough and responsible: Feuer interviewed the Executive Assistant on the same day he learned of the complaint and immediately commenced the investigation given the "serious allegations made against the CEO." (*Id.* ¶¶ 17-18; Keane Decl., Ex. C, Feuer Dep. 304:10-25.) In his interview, Parneros admitted key facts that were consistent with the Executive Assistant's complaint against him. (*See id.* ¶¶ 9-12.) Riggio reported the key facts of the sexual harassment complaint to the Board at the June 27 meeting, and several Board members discussed the sexual harassment allegations with B&N executives prior to that Board meeting. (*Id.* ¶¶ 60-61, 65.)

Second, B&N reasonably relied on witness statements regarding Parneros's bullying of Lindstrom, which numerous executives, including Feuer and Keating, had witnessed. (*Id.* ¶¶ 32-38, 59.) At the June 27 Board meeting itself, Riggio explained the key facts of the bullying complaint to the Board, which he knew from speaking directly with Lindstrom and other executives. (*Id.* ¶ 37, 65; Keane Decl., Ex. I, Riggio Dep. 143:7-11, 148:17-149:23, 152:6-153:2.)

Third, B&N reasonably relied on witness statements and notes regarding Parneros's misconduct with respect to the Potential Transaction. (B&N 56.1 ¶¶ 43-51, 59.) In addition, there were numerous witnesses to Parneros's misconduct at the June 18 meeting with the Potential Acquiror. (*See* B&N 56.1 ¶¶ 43-49.) Prior to the June 27 meeting, Riggio spoke to four attendees of the June 18 meeting, who reported that Parneros spoke negatively about the Company. (*Id.* ¶ 51.) B&N senior executives and the CEO of the Potential Acquiror have testified that, rather than

providing the requested explanation, Parneros instead disparaged B&N's business and claimed that if sales continued to decline at the current rate, B&N would go bust in a few years. (Keane Decl., Ex. L, PA Dep. 126:8-127:5, 129:5-8, 131:25-132:25, 140:16-141:16, 143:9-12; Keane Decl., Ex. K., Hauch Dep. 45:25-48:22; Keane Decl., Ex. D, Lindstrom Dep. 368:14-370:15; Keane Decl., Ex. C, Feuer Dep. 378:22-383:16.) One senior executive's notes of that meeting were sent to Feuer and the Board prior to the June 27 meeting. (B&N 56.1 ¶ 59.) Members of the Board also spoke directly with witnesses regarding Parneros's conduct at the June 18 meeting. (*Id.* ¶ 62.) And at the June 27 Board meeting, Riggio explained the key facts regarding Parneros's sabotage of the Potential Transaction to the Board. (*Id.* ¶ 65.)

Plaintiff's nitpicking critiques of the investigation do not change the result. The legal standard does not require perfection. Even where there is evidence that a company's investigation was deficient in some way (which is not the case here), courts have granted summary judgment as long as it was not grossly irresponsible of the defendants to rely on it. *See, e.g.*, *Kamfar*, 347 F. Supp. 2d at 47-48; *Luisi* v. *JWT Grp., Inc.*, 14 Media L. Rep. (BNA) 1732 (N.Y. Sup. 1987), *aff'd*, 138 A.D.2d 987 (1st Dep't 1988); *cf. Visentin* v. *Haldane Cent. Sch. Dist.*, 4 Misc. 3d 918, 922-23 (Sup. Ct. Putnam Co. 2004); *Chapadeau*, 38 N.Y.2d at 197, 200.

Finally, it was "plainly reasonable" for B&N to disseminate the Press Release in the manner it did. *See Konikoff*, 234 F.3d at 103; *Chapadeau*, 38 N.Y.2d at 199-200. B&N was legally required to disclose the circumstances of Parneros's departure because he was removed as a director for cause. *See* SEC Form 8-K, Item 5.02(a) (requiring that if a director is removed for cause, a public company must disclose, *inter alia*, "a brief description of the circumstances representing the disagreement that the registrant believes caused, in whole or in part, the director's . . . removal."). Accepting Plaintiff's argument would lead to an absurd result: that a public

company could not convey the reasons for an employee's termination even when required to make that disclosure.

D. Plaintiff is Not Entitled to Special, Presumed, or Punitive Damages.

Plaintiff has alleged both libel and libel *per se*. Plaintiff does not dispute that he has failed to plead special damages.[12] (*See* Pl. Oct. 30 Ltr. 2-3) Thus, to the extent that Plaintiff has asserted a cause of action for defamation, separate from his defamation *per se* claim, that must be dismissed. *See, e.g.*, *Thai*, 726 F. Supp. 2d at 329-31, 336 (if a libel claim does not constitute *per se* libel, a plaintiff must plead special damages).

Plaintiff argues that the Press Release is defamatory *per se* because it "damaged Parneros in his profession." (Pl. Oct. 30 Ltr. 2-3.) But Plaintiff assumes too much. As the New York Court of Appeals has explained, for a statement to be defamatory *per se* as tending to injure a plaintiff in his trade, business or profession, the statement must—without reference to any extrinsic facts—relate to a "matter of significance and importance" and discredit him in his chosen calling. *Aronson*, 65 N.Y.2d at 594. The statement that Parneros was terminated for "violations of Company policies" does not meet that standard. Even where an employer uses much stronger language—such as that an employee was terminated "for Cause" or was "guilty of willful

[12] Plaintiff merely pleads that he has suffered "compensable damage, including but not limited to the loss of income and benefits, as well as damage to his reputation and emotional distress." (Keane Decl., Ex. GG, Am. Compl. ¶ 91.) Such a conclusory statement and the absence of any amount of alleged damages does not suffice. *See* Fed. R. Civ. P. 9(g); *see e.g.*, *Berwick* v. *New World Network Int'l, Ltd.*, No. 06-cv-2641 (JGK), 2007 WL 949767, *14 (S.D.N.Y. Mar. 28, 2007) (Koeltl, J.); *Dooner* v. *Keefe, Bruyette & Woods, Inc.*, No. 00 Civ. 572 (JGK), 2003 WL 135706, *5 (Jan. 17, 2003) (Koeltl, J.); *Thai*, 726 F. Supp. 2d at 336; *Nunez* v. *A-T Fin. Info., Inc.*, 957 F. Supp. 438, 441 (S.D.N.Y. 1997); *Boyle* v. *Stiefel Labs., Inc.*, 204 A.D.2d 872, 875 (3d Dep't 1994).

misconduct"—courts have found such language to be capable of both defamatory and non-defamatory meanings. *See Carney* v. *Mem'l Hosp. & Nursing Home of Greene Cty.*, 64 N.Y.2d 770, 772 (1985); *Mandleblatt* v. *Perelman*, 683 F. Supp. 379, 385-86 (S.D.N.Y. 1988).

Nevertheless, even if the Press Release were defamatory *per se* (which it is not), under federal constitutional law, Plaintiff cannot recover presumed or punitive damages for his defamation *per se* claim without a showing of "actual malice" (*i.e.*, "knowledge of falsity or reckless disregard of the truth"), by clear and convincing evidence.[13] *See Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 349 (1974); *Celle*, 209 F.3d at 183; *Dalbec* v. *Gentlemans Companion Inc.*, 828 F.2d 921, 927 (2d Cir. 1987). The record is absent of any such evidence. As discussed *supra*, the Press Release was true, and the Board issued the Press Release based on a thorough and reasonable investigation as well as witness statements. *See supra* Argument II.A & II.C; *Present* v. *Avon Prods., Inc.*, 253 A.D.2d 183, 188 (1st Dep't 1999) (summary judgment granted where company was "cautious and thorough" in internal investigation, and noting that "[e]ven a negligent investigation, without more, does not create an inference" of actual malice).

Further, New York law imposes an additional requirement for a plaintiff to recover punitive damages: a showing of common law malice by clear and convincing evidence. *Prozeralik* v. *Capital Cities Commc'ns, Inc.*, 82 N.Y.2d 466, 479-80 (1993); *Munoz* v. *Puretz*, 301 A.D.2d 382, 384 (1st Dep't 2003). To show common law malice, a plaintiff must demonstrate "outrageous

[13] Under New York law, courts will presume that general damages will result where a plaintiff has shown that the statement is defamatory *per se* and has established the constitutional requirement of actual malice. *Liberman* v. *Gelstein*, 80 N.Y.2d 429, 435 & n.1 (1992); *Gertz*, 418 U.S. at 349-50. However, even when general damages are presumed, a plaintiff must prove actual damages to be entitled to more than nominal damages. *Fashion Boutique of Short Hills, Inc.* v. *Fendi USA, Inc.*, 314 F.3d 48, 59 (2d Cir. 2002).

conduct which is malicious, wanton, reckless, or in willful disregard for another's rights." *Prozeralik*, 82 N.Y.2d at 478-80. In addition, "[a] triable issue as to common-law malice is raised only if a reasonable jury could find that the speaker was *solely* motivated by a desire to injure the plaintiff." *Present*, 253 A.D.2d at 189 (emphasis in original). There are no such facts in the record that would support such an inference, much less permit such a finding by clear and convincing evidence.

III. PLAINTIFF'S CLAIM FOR BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING FAILS AS A MATTER OF LAW

Citing his "employment agreements," Plaintiff claims that B&N breached the covenant of good faith and fair dealing under those contracts by "firing [him] without cause just prior to the date [B&N] would have awarded him an additional $3.6 million in equity." (Keane Decl., Ex. GG, Am. Compl. ¶ 97.) In order to prevail on such a claim, a plaintiff must prove: (1) defendant owed plaintiff "a duty to act in good faith and conduct fair dealing"; (2) defendant breached that duty; and (3) the breach proximately caused plaintiff's damages. *Schonfeld* v. *Wells Fargo Bank, N.A.*, 1:15-cv-01425 (MAD/CFH), 2017 WL 4326057, at *5 (N.D.N.Y. Sept. 27, 2017). There are no material facts to support any of those elements.

Plaintiff's claim is based on Section 3.5 of his employment agreement, which provides, in relevant part, that during his employment, Parneros would "be granted Company equity awards or equity-based awards with an aggregate grant date value equal to 300% of your Annual Base Salary," subject to the terms and conditions of the Company's Amended and Restated 2009 Incentive Plan. (B&N 56.1 ¶ 5.) But Plaintiff ignores Section 3.9 of his contract which provides for the payments he would be entitled to if terminated. That section does not provide for the grant of any new equity awards in the event of termination for any reason, whether termination

with or without Cause, voluntary termination with or without Good Reason, non-renewal, death, or disability. (*Id.* ¶¶ 6-8.)

It is well-established that a defendant only owes such a duty "to the extent it is consistent with the provisions of the [underlying] contract." *Phoenix Capital Investments LLC* v. *Ellington Mgmt. Grp., L.L.C.*, 51 A.D.3d 549, 550 (1st Dep't 2008). Here, Plaintiff did not have a contractual right to an equity award if terminated—whether for Cause or any other reason. (B&N 56.1 ¶¶ 5-8.) Under *any* termination scenario, he would not receive any new grants of equity. Thus, because Plaintiff had no contractual right to any future equity award, B&N owed him no duty that would support his covenant claim.[14]

New York courts that have addressed similar claims have "swiftly rejected them." *Woodard* v. *Reliance Worldwide Corp.*, No. 18-CV-9058 (RA), 2019 WL 3288152, at *3 (S.D.N.Y. July 22, 2019) (dismissing implied covenant claim, even assuming company intentionally delayed his termination to avoid paying bonus, because plaintiff, who was a high-level executive, had negotiated the terms of the bonus and had not "been deprived of anything to which he was entitled" because the condition for the bonus (*i.e.*, termination within seven days of an acquisition) never materialized). *See also Phoenix Capital*, 51 A.D.3d at 550 (affirming

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[14] The terms of the 2009 Plan further support this interpretation of the unambiguous plain text of the contractual terms. The 2009 Plan provides that only employees or directors are eligible to participate (Section 4.1), that nothing in the Plan shall affect the Company's right to terminate an employee or director "at any time for any reason" (Section 13.2), that "the Company shall not be liable for the loss of existing or potential profit from an Award granted in the event of termination" (Section 13.2), that "[n]o Employee or Participant shall have any claim to be granted any Award under the Plan" (Section 13.2), and that a prospective recipient will not have any rights with respect to such Award "until and unless such recipient shall have executed an agreement or other instrument evidencing the Award" (Section 13.3). (B&N 56.1 ¶ 8.)

dismissal of plaintiff's implied covenant claim where plaintiff "actively negotiated" contract provision, "with all its risks and benefits to both parties, and cannot nullify that provision on the basis of a bare allegation that defendant acted unfairly").[15] As in *Woodard* and *Phoenix Capital*, to allow Plaintiff to pursue this claim would "'unjustifiably frustrate the expectations of the parties as made explicit in the contract' and would inappropriately permit the continuation of 'an invalid substitute for a nonviable breach of contract claim.'" *Woodard*, 2019 WL 3288152, at *3 (quoting *Phoenix Capital*, 51 A.D.3d at 550).

Second, courts will only find a breach of the duty if the plaintiff shows that the defendant "deliberately [acted] to sabotage the other party's benefits under the contract" and with an "improper motive." *See Nautilus Neurosci., Inc.* v. *Fares*, No. 13 Civ. 1078 (SAS), 2013 WL 6501692, at *6 (S.D.N.Y. Dec. 11, 2013); *Wagner* v. *JP Morgan Chase Bank*, No. 06 Civ.

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[15] Plaintiff's cases are not to the contrary. In *Fischkoff* v. *Iovance Biotherapeutics, Inc.*, the plaintiff alleged that his former employer "contrived the 'poor performance' to deprive him of the [bonus]"—which he was contractually entitled to if the termination was without Cause. No. 17 Civ. 5041 (AT) (GWG), 2018 WL 4574890, *7 (S.D.N.Y. July 5, 2018). Unlike in *Fischkoff*, Parneros had no contractual entitlement for a prospective equity award grant if his termination was without Cause. *Longhi* v. *Lombard Risk Sys., Inc.*, is likewise inapposite as the claims there involved the defendant's failure to set performance goals, which were required to receive a contractually-guaranteed bonus. No. 18-CV-8077 (VSB), 2019 WL 4805735, *8-10 (S.D.N.Y. Sept. 30, 2019). Plaintiff's other two cases—*Sandler* v. *Montefiore Health Sys., Inc.*, No. 16-CV-2258 (JPO), 2018 WL 4636835 (S.D.N.Y. Sept. 27, 2018), and *Maddaloni Jewelers, Inc.* v. *Rolex Watch U.S.A., Inc.*, 41 A.D.3d 269 (1st Dep't 2007)—involve a party's timeliness as to performance of a contract and provide no valuable insight into any relevant issue in this case.

3126 (RJS), 2011 WL 856262, at *4 (S.D.N.Y. Mar. 9, 2011).[16] Here, there is no evidence that B&N acted in bad faith or with the deliberate purpose of depriving Plaintiff of his upcoming equity. While it is undisputed that Parneros's employment contract provided for an equity-based award each year of employment (B&N 56.1 ¶ 5), Plaintiff can point to no record evidence to support the assertion that the timing or fact of his dismissal was influenced in any way by his impending equity grant.[17] The undisputed evidence shows that the timing of his dismissal was influenced by the timing of his misconduct.

CONCLUSION

For the reasons set forth above, 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.

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[16] Again, Plaintiff's cases do not compel a different result. Notably, *Fischkoff* and *Longhi* were decided favorably to the plaintiff on a motion to dismiss and a motion for leave to amend. On summary judgment, Plaintiff must do more; Plaintiff must show a triable issue of fact that the Board purposefully sought to deprive Parneros of a new equity grant. *See, e.g.*, *Fischkoff*, 2018 WL 4574890, *7 (denying motion to dismiss where plaintiff pleaded theory that defendant "contrived the 'poor performance' to deprive him of the [bonus]").

[17] Even in employment discrimination cases (as raised by the Court at the pre-motion conference), proximity in time can only make out a minimal *prima facie* case. Once an employer rebuts that inference by proffering a legitimate explanation for the action, the plaintiff must present some other proof to rebut the defendant's explanation. *Ponniah Das* v. *Our Lady of Mercy Med. Ctr.*, No. 00 Civ. 2574 (JSM), 2002 WL 826877, at *11-12 (S.D.N.Y. Apr. 30, 2002) ("Proximity in time alone will not support a finding (as opposed to making out a minimal prima facie case) that a plaintiff has proved a causal connection between protected activity and an adverse employment action."), *aff'd sub nom. Das* v. *Our Lady of Mercy Med. Ctr.*, 56 F. App'x 12 (2d Cir. 2003).

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PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

By: /s/ Jay Cohen
Jay Cohen
Liza M. Velazquez
Maria H. Keane
Arianna Markel

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
jaycohen@paulweiss.com
lvelazquez@paulweiss.com
mkeane@paulweiss.com
amarkel@paulweiss.com

Attorneys for Defendant and
Counterclaim Plaintiff Barnes & Noble, Inc.

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. 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 8,426.

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November 22, 2019

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: /s/ Jay Cohen
Jay Cohen
Liza M. Velazquez
Maria H. Keane
Arianna Markel

1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
jaycohen@paulweiss.com
lvelazquez@paulweiss.com
mkeane@paulweiss.com
amarkel@paulweiss.com

Attorneys for Defendant and Counterclaim Plaintiff Barnes & Noble, Inc.