UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

DEMOS PARNEROS,

Plaintiff and
Counterclaim Defendant,

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

- against -

BARNES & NOBLE, INC.,

Defendant and
Counterclaim Plaintiff.

- x

==========

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

==========

Vladeck, Raskin & Clark, P.C.
565 Fifth Avenue, 9th Floor
New York, New York 10017
(212) 403-7300
Attorneys for Plaintiff,
Counterclaim Defendant

Of Counsel:
Debra L. Raskin
Anne L. Clark

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Plaintiff Demos Parneros submits this memorandum in opposition to defendant Barnes & Noble, Inc.'s ("B&N") motion for partial summary judgment on plaintiff's claims of defamation and breach of the implicit covenant of good faith and fair dealing. By its false and grossly irresponsible Press Release concerning plaintiff's firing, B&N shattered the reputation Parneros built over three decades. Similarly ill-intentioned and in breach of the implicit covenant was the timing of his firing which denied Parneros equity that he earned the prior year. Defendant's motion should be denied.

FACTS

In positions of increasing responsibility, Parneros worked successfully for almost 30 years at Staples. B&N hired him on November 16, 2016, as Chief Operating Officer ("COO"). Five months later, B&N promoted Parneros to CEO and appointed him to the Board. (Pl. 56.1 ¶¶1-2, 206) His CEO contract granted him $3.6 million in equity annually, with the first tranche vesting on July 13, 2018. (Id. ¶89)

After arriving at the troubled Company, Parneros hired talented executives and, with his team, developed a well-received five-year plan and initiatives for improving B&N's declining business. (Id. ¶¶49, 119-20) Despite Parneros's accomplishments, B&N fired him on July 2, 2018, using two fabricated reasons and later, a third false justification. (Id. ¶191) Weeks earlier, B&N had acknowledged one of those reasons, an Executive Assistant's harassment allegations, as not a "big deal" and "closed." The other two justifications involved issues B&N never discussed with Parneros. (Id. ¶¶26, 28, 32-35, 104-05, 182, 190) Those allegations were the pretextual basis for the Press Release about Parneros's firing that made him widely known as a sexual harasser and unemployable. (Id. ¶¶194-208)

One of the bogus justifications for the Press Release was Parneros's relationship with Allen Lindstrom, Chief Financial Officer ("CFO"). Although Parneros got along well with

most of his reports, Lindstrom was a continuing source of difficulty. Parneros repeatedly spoke about Lindstrom with Riggio and other Board members, who also found Lindstrom's performance lacking. (Id. ¶¶209-29)

Lindstrom testified that Parneros's dissatisfaction was genuine and that Parneros never raised his voice to him. Nonetheless, Lindstrom chafed at the supervision. In the year before Parneros was fired, Lindstrom complained about Parneros to B&N General Counsel Bradley Feuer; Human Resources head Michelle Smith; Riggio; and Board members. None took any action. (Id. ¶¶32-38)

In 2018, Parneros discussed with those officials replacing Lindstrom. All supported that recommendation. (Id. ¶¶215-16, 226-28) In late May 2018, Lindstrom complained about Parneros in his self-evaluation, which Riggio characterized as Lindstrom's attempt to "cover his ass." Parneros was drafting responses when B&N fired Parneros without discussing the matter with him. (Id. ¶¶35, 37)

The purported investigation of the Executive Assistant's complaint was equally irresponsible. In late May or early June 2018, Riggio told Parneros that she had complained that Parneros made her uncomfortable on two occasions. First, Parneros and the Executive Assistant allegedly stood back to back to compare heights. Parneros responded that once, without incident, they stood next to each other to compare heights. (Id. ¶¶9, 23-24) The other alleged incident was Parneros's showing her a hotel website and saying, in substance, that if he wined and dined her there, he bet she would "put out." (Id. ¶¶23, 25-26)

Parneros was appalled at the allegations. He told Riggio that he and the Executive Assistant often spoke informally. While comparing vacations in Canada, Parneros described as charming and romantic, the hotel where he and his wife stayed. The Executive

Assistant asked about the hotel, so Parneros showed website pictures on his computer about four feet from her; they looked from opposite sides of his desk and never touched. Parneros told Riggio he never made such comments and never used any inappropriate language. (Id.)

Riggio responded that even if the Executive Assistant's allegations were true, it was not a "big deal" and was not a "Me-Too thing." Initially Riggio said he would tell the Board, but later said he was not sure. They agreed that with SVP of Corporate Communications Mary Ellen Keating, Parneros would apologize to the Executive Assistant if he had made her uncomfortable. (Id. ¶¶26, 28, 98)

Parneros met briefly with Keating, who frequently worked with Parneros and never heard him use any inappropriate language. They met with the Executive Assistant by early June 2018. Parneros explained that he never meant the conversation to be about anything other than a common destination, but he would not have such discussions again. He apologized for having made her uncomfortable. The Executive Assistant said she was satisfied and would move forward. (Id. ¶¶100-03) Keating later told Parneros that the Executive Assistant accepted his apology, that everything was "fine," and the matter was "over with." Riggio told Parneros that the meeting had gone well and he considered it "closed." (Id. ¶¶103-05)

B&N claims that Keating and Riggio, with counsel, investigated the Executive Assistant's complaint. Defendant shielded as privileged all information other than meetings with Parneros and the apology meeting. Riggio testified he played no role in the investigation. Keating had no training or experience in conducting investigations. (Id. ¶¶16-21, 93-96, 107-09) Because of defendant's asserted privilege, the only evidence concerning the investigation are the meetings weeks before Parneros was fired where B&N agreed the matter was resolved. On the

basis of that shoddy investigation, B&N issued the Press Release seen by multiple publications, media outlets, and the public as lumping Parneros with the Harvey Weinsteins of the world.

The final false justification for the Press Release involved Parneros, at a June 18, 2018 meeting, allegedly undermining the Potential Acquirer's possible purchase of B&N. Parneros had multiple communications with the CEO and other representatives of the Potential Acquirer since February 2018. (Id. ¶¶112-16, 121-23, 130, 132, 152) Lindstrom was also involved and shared detailed information, including the B&N five-year plan and Parneros's business improvement initiatives. (Id. ¶¶ 116-18, 121, 127, 140-44, 165)

Riggio recommended that the Potential Acquirer CEO retain Parneros as CEO after the sale and the Potential Acquirer agreed. If the Potential Acquirer did not retain him as CEO, Parneros's contract entitled him to substantial severance and fully vested equity. Parneros voted for the acquisition with the Board. (Id. ¶¶113, 130-31, 146-48)

In the May/June 2018 period, B&N sales were worse than anticipated and B&N executives told the Potential Acquirer that part of the cause was a computer-system problem. The Potential Acquirer's executives grew increasingly concerned and the week before the June 18 meeting discussed the real possibility the deal would fail. (Id. ¶¶135-52)

At the June 18 meeting, Parneros's presentation was only about 10-15 minutes. Chief of Merchandizing Tim Mantel and Head of Stores Carl Hauch made presentations, followed by Lindstrom. The B&N team talked about their initiatives and explained the declining sales, which defendant did not blame on Parneros. The Potential Acquirer, which was very "data-driven," was not satisfied with B&N's explanations. Parneros denied ever making the negative statements in the June 18 meeting B&N ascribes to him. (Id. ¶¶45-49, 153-74)

The Potential Acquirer described the meeting as having "gone as expected." The Potential Acquirer's CEO testified that Parneros's allegedly longwinded conduct on June 18 was similar to plaintiff's earlier discussions—communications followed by the Potential Acquirer's initial and then increased purchase offer. The Potential Acquirer testified that had the numbers been better by June 2018, it would have consummated the purchase. (Id. ¶¶160, 171, 174)

On June 19, the Potential Acquirer CEO told Riggio that the deal was off. He cited the sales decline and the B&N executives' inability to explain it. The Potential Acquirer did not mention the June 18 meeting. Riggio was upset that he had lost the graceful departure opportunity; despite what the Potential Acquirer said, Riggio made Parneros and his brief presentation on June 18 the target for his anger. (Id. ¶¶175, 179-80)

Riggio gave the Board three purported reasons for firing Parneros: the alleged harassment of the Executive Assistant, the supposed bullying of Lindstrom, and the purported undermining at the June 18 meeting. Riggio told the Board that the Executive Assistant's allegations were credible, but did not explain why, nor could Board members describe her specific contentions. Board member Paul Guenther testified that Riggio did not say Parneros solicited sexual favors, touched her, or used salacious language. The Board members—including Riggio—did not understand what, if any, investigation had been conducted about harassment. (Id. ¶¶31, 187-89)

There was no investigation of Lindstrom's complaints, known to officers and directors for many months, and no one asked Parneros about them. (Id. ¶¶32-38, 190) There was no investigation about the June 18 meeting, including asking Parneros. Had anyone from B&N asked the Potential Acquirer CEO, he would have said, as he told Riggio, that the deal failed

because of poor sales and Company executives' inability to identify a transitory cause. (Id. ¶¶48-50, 62, 165, 172-75)

On July 2, 2018 Riggio told Parneros that he was fired because of the alleged harassment and his purported treatment of Lindstrom. The first time Parneros heard that the final meeting with the Potential Acquirer had become a purported reason was when it was included in defendant's Counterclaims on October 30, 2018. (Id. ¶191) Board members Al Ferrara and Kimberly Van Der Zon, who administered B&N's equity plans, knew that the firing was ten days short of vesting for the equity Parneros earned the prior year. (Id. ¶¶8, 76, 90-92) Riggio threatened Parneros that if he went to the press, B&N would make his life "miserable." (Id. ¶191)

The Board approved a press release announcing Parneros's immediate firing for violating Company policies. The language underscored the seriousness of plaintiff's alleged sins: the Board was advised by the Paul Weiss law firm; Parneros got no severance and was removed from the Board; and Parneros was not fired for "financial reporting, policies or practices or any potential fraud relating thereto." Although the Press Release charged violations of Company policies, Board members could barely describe those policies and admitted to having read them years ago, if ever. (Id. ¶¶71-74, 77-78)

One recruiter testified that the Press Release's unmistakable implication was a firing for sexual harassment or sexual misconduct and that it ended Parneros's career. B&N employees received calls, including from investors, asking about Parneros's engaging in sexual harassment. Articles and web postings resulting in millions of views linked Parneros to known sexual harassers. The announcement destroyed Parneros's reputation and made it impossible for him to find employment despite hundreds of job search efforts. (Id. ¶¶194-208)

While Parneros did not engage in the alleged misconduct, even if he had, the behavior would not be at odds with B&N workplace norms. [redacted]. (Id. ¶¶258-76)[1]

There is also extensive proof of bad behavior by Riggio who insulted employees to their face and behind their backs and tolerated similar behavior in other executives. (Id. ¶¶210, 230-54) That record further evidences B&N's bad faith in issuing the false announcement that was consistently viewed as charging the worst Me-Too sins and ended Parneros's career.

ARGUMENT

I. DEFENDANT IS NOT ENTITLED TO JUDGMENT ON THE DEFAMATION CLAIM

The Press Release that abruptly ended Parneros's success in the retail industry meets the requirements for defamation claims. See Meloff v. New York Life Ins. Co., 240 F.3d 138, 145 (2d Cir. 2001) ("New York requires a libel plaintiff to prove . . . (1) a written defamatory statement of fact regarding the plaintiff; (2) published to a third party by the defendant; (3) defendant's fault . . . ; (4) falsity; []and (5) injury to plaintiff."). B&N does not dispute that the Press Release purports to be a statement of fact, that concerns plaintiff and exposes him to "to public hatred, shame. . . degradation or disgrace . . . ."[2] and was published to

[1] [redacted]. (Pl. 56.1 ¶¶255-57)

[2] Wexler v. Allegion (UK) Ltd., 374 F. Supp. 3d 302, 310 (S.D.N.Y. 2019) (internal citations omitted).

third parties. As to the remaining elements, Parneros has shown evidence that the statement is false, and that B&N is at fault for its publication that caused cognizable damages.

Defendant relies on writings from employees and directors that are inadmissible hearsay. (Def. 56.1 ¶¶13-14, 45-49, 62-63) Most are not contemporaneous (Def. 56.1 ¶¶14, 46-47, 48-49, 62-63), including notes the Executive Assistant created months after litigation commenced. (Pl. 56.1 ¶14) None fall within the business record exception. See United States v. Taubman, 297 F.3d 161, 165 (2d Cir. 2002) (excluding meeting notes); Lion Oil Trading & Transp., Inc. v Statoil Mktg. & Trading (US), Inc., Nos. 08 Civ. 11315, 09 Civ. 2081(WHP), 2011 WL 855876, at *6 (S.D.N.Y. Feb. 28, 2011) (memoranda that were "unique responses to unusual or isolated events were not business records). Most were not provided to the Board before Parneros's dismissal. (Pl. 56.1 ¶¶13-14, 45, 48-49, 62-63). None should be considered on this motion.

A. Significant Evidence Demonstrates the Falsity of the Announcement

As described above and in Pl. 56.1, substantial evidence establishes that the Press Release is false. Parneros was not fired "for violations of the Company's policies," because he never violated any policies. As the Second Circuit has stated: "[P]ublication of a discharge would be defamatory if 'the publication contains an insinuation that the discharge was for some misconduct.'"[3] The Press Release so states with the false allegation that plaintiff was fired for violating Company policies; it therefore satisfies the falsity element.[4]

[3] Davis v. Ross, 754 F.2d 80, 84 (2d Cir. 1985) (quoting Nichols v. Item Publishers, 309 N.Y. 596, 601 (1956)); see Pisani v. Staten Island Univ. Hosp., No. 06-CV-1016(JFB)(MLO), 2008 WL 1771922 (E.D.N.Y. Apr. 15, 2008).

[4] B&N cites (Def. Br. 10-11) inapposite cases. See Silverman v. Clark, 35 A.D.3d 1 (lst

To avoid the evidence that Parneros did not engage in misconduct, B&N misstates the record. While B&N writes, "Parneros admits that he was terminated 'for violations of the Company's policies'" (Def. Br. 10), its citations demonstrate only that Parneros agreed that the alleged violations were the reasons defendant told him. Parneros never admitted (Pl. 56.1 ¶¶13-14, 23, 25-26, 32-33, 35-37, 45-48) that defendant's contentions that he violated B&N policies were true. See Yazurlo v. Board of Education of the City of Yonkers, No. 17 Civ. 2027(NSR), 2018 WL 4572255, at *4 (S.D.N.Y. Sept. 24, 2018) (denying dismissal of defamation claim; plaintiff agreed to constructive discharge but never admitted misusing government computer).

The statement that the B&N Board "announced the termination . . . for violations of the Company's policies" cannot as a matter of law be read as simply repeating what the Board stated as why it fired plaintiff. That interpretation, contrary to the law governing summary judgment motions[5] and defamation claims, construes the Press Release in the light most

---

Dept. 2006) (no evidence certain statements were false; others were nonactionable opinion); Chau v. Lewis, 771 F.3d 118 (2d Cir. 2014) (statements contained no negative characterization of plaintiff; others were opinion, hyperbole, or industry truisms); Bloom v. Fox News of Los Angeles, 528 F. Supp. 2d 69, 76 (E.D.N.Y. 2007) ("broadcast was a . . . true report of the state disciplinary proceedings" protected by statute; rest was opinion); Thai v. Cayre Grp., Ltd., 726 F. Supp. 2d 323, 335-35 (S.D.N.Y. 2010) (statement was not "of and concerning" plaintiff); Ratajack v. Brewster Fire Dep't, Inc., 178 F. Supp. 3d 118, 165-72 (S.D.N.Y. 2016) (statements were opinion or protected by qualified privilege).

[5] B&N omits from its discussion of summary judgment (Def. Br. 9-10), the principle that the Court must "'construe the facts in the light most favorable to the non-moving party

favorable to defendant. A more plausible meaning, understood by the press and the public, was the false contention that Parneros was fired because he had violated B&N policy, namely the prohibition on sexual harassment. (Pl. 56.1 ¶¶194-208)

Where, as here, "the challenged words are reasonably susceptible of multiple meanings . . . it is then for the trier of fact . . . to determine in what sense the words were used and understood."[6] "[C]ourts should not labor 'to interpret such writings in their mildest and most inoffensive sense to hold them nonlibelous.'"[7] Moreover, "[c]hallenged statements are not to be

---

and must resolve all ambiguities and draw all reasonable inferences against the movant.'" Walsh v. New York City Hous. Auth., 828 F.3d 70, 74 (2d Cir. 2016) (quoting Aulicino v. New York City Dep't of Homeless Servs., 580 F.3d 73, 79-80 (2d Cir. 2009)); see Thompson v. Gjivoge, 896 F.2d 716, 722 (2d Cir. 1990) (reversing in part summary judgment on contract claim; "Although we cannot say that plaintiffs' interpretation is more correct than another reading, it strikes us as an entirely permissible construction . . . ."). Defendant also ignores that evidence from interested witnesses must be disregarded on this motion. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000).

[6] Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 178 (2d Cir. 2000) (quoting Davis, 754 F.2d at 83); see Mitre Sports Int'l Ltd. V. Home Box Office, Inc., 22 F. Supp. 3d 240, 252-53 (S.D.N.Y 2014).

[7] Agbimson v. Handy, No. 17cv9252, 2019 WL 3817207, at *3 (S.D.N.Y. Aug. 14, 2019) (quoting Karedes v. Ackerley Grp., Inc., 423 F.3d 107, 114 (2d Cir. 2005)); see Lucking v. Maier, No. 03 Civ. 1401(NRB), 2003 WL 23018787, at *3 (S.D.N.Y. Dec. 23, 2003).

read in isolation, but must be perused as the average reader would against the 'whole apparent scope and intent' of the writing.'"[8]

Not only did the "average reader" understand the Press Release in the context of the Me-Too movement (Pl. 56.1 ¶¶194-204), the announcement's "scope and intent" underscores the seriousness of the violations defendant falsely imputes to Parneros.[9] The Press Release emphasizes that B&N was "advised by the law firm Paul, Weiss []" (Pl. 56.1 ¶77), not counselors a company would retain for a trivial matter. Riggio testified that such a statement about consulting counsel on a termination decision "did not sound positive." (Id. ¶78) Highlighting the gravity of the false allegations, the Press Release recites that "Parneros will not receive any severance payment and . . . is no longer a member of the Company's Board of Directors." (Id. ¶77)

---

[8] Celle, 209 F.3d at 177 (quoting November v. Time Inc., 13 N.Y.2d 175, 178 (1963)); see Abakporo v. Sahara Reporters, No. 10 CV 3256(RJD)(VVP), 2011 WL 4460547, at *11 (E.D.N.Y. Sept. 26, 2011).

[9] B&N erroneously contends (Def. Br. 12 n.5) that plaintiff relies on the Press Release's "overall impact." Rather, the false statements that Parneros violated B&N policies should be evaluated, as required, in the context of the rest of the announcement and likely understanding of the average reader. B&N cites Aronson v. Wiersma, 65 N.Y.2d 592, 594-95 (1985), which states: "The words must be construed in the context of the entire statement or publication as a whole. . . ."; cf. Biro v. Conde Nast, 883 F. Supp. 2d 441 (S.D.N.Y. 2012) (challenging two dozen passages in 16,000 word article; multiple statements conceded substantially true; others constitute opinion; dismissal denied on others).

B&N cannot establish as a matter of law that the Press Release did nothing more than articulate the Board's alleged basis for firing Parneros. Rather, the factfinder reasonably could determine that the Press Release states the defamatory untruth that Parneros was fired for serious misconduct including sexual harassment.[10]

B. Press Release Can be Read as Defamatory by Implication

B&N erroneously contends that as a matter of law, Parneros cannot demonstrate defamation by implication. (Def. Br. 12-16) Under that doctrine, a plaintiff need not show "that a direct statement is, in and of itself, false; rather [liability] is premised on 'false suggestions,

[10] Unlike the defendants in B&N's citations (Def. Br. 10, 11), B&N does not and cannot contend that the Press Release was "substantially true," that its statements "would not have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" Tannerite Sports, LLC v. NBCUniversal News Grp., 864 F.3d 236, 242 (2d Cir. 2017) (internal citations omitted) ("substantially true to describe targets designed to explode as "bombs"); see Tolbert v. Smith, 790 F.3d 427, 439-40 (2d Cir. 2015) (where health department precluded kitchen from reopening, statement that the department "closed" the kitchen was substantially true). The pleaded truth here is that Parneros engaged in no wrongdoing, a far different conclusion from what readers understood from the Press Release. Cf. Dillon v. City of New York, 261 A.D.2d 34, 39 (1st Dept. 1999) (employer truthfully described as a "firing" its discharge of an employee who impermissibly resigned before the end of contract); Weber v. Multimedia Entem't, Inc., No. 97 Civ. 0682(JGK), 2000 WL 526726, at *10 (S.D.N.Y. May 2, 2000) (where plaintiff admitted physically abusing daughter and had used drugs, describing plaintiff as physically abusive drug addict was substantially true).

impressions and implications arising from otherwise truthful statements. . . . [D]efamation by implication can include statements whose falsity is based not on what was said, but rather 'by omitting or strategically juxtaposing key facts.'"[11] Because Parneros has adduced proof evidencing the falsity of the Press Release, the Court need not reach defamation by implication.[12] However, even if the Press Release were only a recitation of the reasons the Board gave Parneros, "the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference." Agbimson, 2019 WL 3817207, at *6. Even if every statement in the Press Release were true, which they are not, plaintiff still has demonstrated that B&N defamed him by implication.

Contrary to B&N's contention (Def. Br. 13 n.6), this Court in Agbimson found a defamatory implication based on the kind of evidence Parneros has adduced: readers' reactions to the challenged publication. In Agbimson, the defamatory "implication [was] further bolstered by deposition testimony that a [third party] perceived the letter to be 'accusatory.' [The plaintiff] also received calls from [third parties] asking him whether he was stealing money . . . ." 2019 WL 3817207, at *7. Similarly, multiple third parties saw the Press Release as charging Parneros with sexual harassment. (Pl. 56.1 ¶¶194-202)[13] Such evidence also supported a claim of

[11] Partridge v. State, 173 A.D.3d 86, 90-91 (3d Dept. 2019)(internal quotations omitted).

[12] See Macineirghe v. Cty. of Suffolk, No. 13-cv-1512(ADS)(SIL), 2015 WL 4459456, at *13 (E.D.N.Y. July 21, 2015).

[13] The statements in the cases defendant cites (Def. Br. 12-13) have no such negative implication and are otherwise inapposite. See Stepanov v. Dow Jones & Co., 120 A.D.3d 28, 40 (1st Dept. 2014) ("[N]othing is expressed or implied in defendant's article that is capable of a defamatory meaning."); Kavanagh v. Zwilling, 997 F. Supp. 2d 241

defamation by implication in Keough v. Texaco Inc., No. 97 Civ. 5981(LMM), 1999 WL 61836, at *6 (S.D.N.Y. Feb. 10, 1999) ("Whether . . . Texaco's statements are facially defamatory, we . . . know from . . . subsequent press reports that Texaco's statements may be 'reasonably read to import a false innuendo.'").[14] There is nothing "strained" or "artificial"[15] in viewing the Press Release as falsely charging Parneros with serious wrongdoing—whether it be sexual harassment or otherwise—that "'tend[ed] to disparage [him] in the way of [his] office, profession or trade.'" DiFolco v. MSNBC Cable L.L.C., 622 F.3d 104, 114 (2d Cir. 2010) (quoting Nichols, 309 N.Y. at 601).

B&N also errs when it asserts that the Press Release is "equally suggestive" of defamatory and non-defamatory meanings. (Def. Br. 14)[16] Equally false and equally defamatory

---

(S.D.N.Y. 2014) (article explicitly refuted defamatory implication); Udell v. NYP Holdings, Inc., 169 A.D.3d 954 (2d Dept. 2019) (no defamation by implication where article based on substantially true statements and opinion; plaintiff essentially admitted violation).

[14] Contrary to B&N's contention (Def. Br. 15 n.9), plaintiff cites Keough as recognizing that third party reactions evidence the defamatory implication of facially true statements; plaintiff is not relying on Keough's analysis of whether the defendant endorsed that defamatory implication.

[15] Goldman v. Barrett, No. 15 Civ. 9223(PGG), 2016 WL 5942529, at *6 (S.D.N.Y. Aug. 24, 2016) (Def. Br. 13) (defendant accurately reported licensing agency fined each plaintiff Doctor of Osteopathy for using the M.D. title; no implication plaintiffs had committed health care fraud).

[16] Unlike the Press Release, the statement in the sole case B&N cites on this issue, (Def.

are the other kinds of misconduct B&N suggests could be encompassed by the announcement's allegations of "violations of Company policy": "undisclosed conflicts of interest, acceptance of improper gifts, discrimination, . . falsifying expense reports, disclosure of confidential information, or use of B&N assets for . . . improper purposes." (Def. Br. 13) B&N does not and cannot suggest that Parneros engaged in such wrongdoing. Even if Press Release's statements were true, which they are not, a factfinder could view them as falsely implying a defamatory conclusion.[17]

The four corners of the Press Release can be read to reflect that B&N intended the defamatory implication. The announcement has language similar to statements courts cite as reflecting a defendant endorsing a defamatory implication. The reference to Paul Weiss's advice on Parneros's dismissal suggests that B&N intended to present the purported violations as serious wrongdoing, whether sexual harassment or other misconduct. See Biro, 883 F. Supp. 2d at 477 (factfinder could conclude that defendant intended inference that plaintiff falsified paintings' provenance, in part because the article truthfully recited expert's view that in most such cases, the artwork cannot be authenticated). The Press Release's juxtaposing Parneros's

---

Br. 13-14) suggested "[o]n its face" "neither a positive nor negative inference." Wilson v. New York, No. 15-CV-23, 2018 WL 1466770, at *5 (E.D.N.Y. Mar. 26, 2018). B&N cannot adduce any evidence that third parties viewed the Press Release as benign. Accordingly, it is irrelevant that some readers may have been less certain than others that the Press Release charged Parneros with sexual harassment.

[17] In contrast, the article in Martin v. Hearst Corp., 777 F.3d 546, 551 (2d Cir. 2015) (Def. Br. 12), reported the truth of plaintiff's prior arrest, even though a statute authorized the "legal fiction[]" of expungement a year later.

purported "violations of the Company's policies" with categories of significant misconduct not at issue, may also be read as B&N's endorsement that plaintiff's alleged wrongdoing was serious. See Mitre Sports, 22 F. Supp. 3d at 253-54 (denying dismissal of defamation by implication claim where footage showed children stitching soccer balls even though program described plaintiff as wanting to "wipe[] out" such employment practices).[18] Finally, the Press Release's recitation that Parneros was denied severance and removed from the Board evidences defendant's intent that the public infer the defamatory message that this was no trivial infraction.

Although it contends that the four corners of the Press Release must reflect defendant's endorsement of the defamatory implication, B&N cites extrinsic evidence: prior drafts of the announcement. (Def. Br. 15-16) If such evidence is relevant, the factfinder could equally infer that B&N deleted prior drafts' reference to "sexual harassment" because defendant correctly anticipated the public would understand that to be the reason for Parneros's dismissal. Had it not intended the defamatory implication, B&N would have stated, as it did in other Press Release drafts, that Parneros had resigned. (Pl. 56.1 ¶¶79, 257) B&N used such innocuous language in announcing the departure of plaintiff's predecessor as CEO, fired for inappropriate sex-related conduct among other wrongdoing. (See p. 7, supra) The factfinder may reasonably conclude that B&N endorsed the defamatory meaning and engaged in defamation by implication.

C. Significant Evidence Demonstrates B&N's Fault

B&N shattered Parneros's stellar reputation (Pl. 56.1 ¶¶194-204) when it issued a Press Release on the basis of a false harassment charge Riggio characterized as not a "big deal"

[18] See Partridge, 130 A.D.3d at 87 (after plaintiff arrested for possession of marijuana, placement of his photo under those of alleged sex offenders could suggest defendant's endorsement of defamatory message).

and not a "Me-Too thing." (Id. ¶26) Defendant also relied on two other groundless allegations of misconduct that defendant never discussed with Parneros: his purported mistreatment of Lindstrom and Parneros's alleged negative behavior in the final meeting with the Potential Acquirer. (See id. ¶¶32-28, 48-50, 162, 190) Substantial evidence of defendant's gross irresponsibility would permit a factfinder to conclude that the Press Release is actionable under the standard Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196 (1975), applies to such false statements about a matter of public concern.

"A wide variety of factors enter into the determination of whether a statement was published in a grossly irresponsible manner." Dalbec v. Gentleman's Companion, 828 F.2d 921, 924 (2d Cir. 1987). Courts have considered whether the defendant followed sound journalistic practices,[19] followed normal procedures including review of the writing, had any reason to doubt the accuracy of the source and thus had a duty of further inquiry, and could easily have verified the challenged statement. See Pisani, 2008 WL 1771922, at *16; Fine v. ESPN, Inc., 11 F. Supp. 3d 209, 224 (N.D.N.Y. 2014). Moreover, in contending that its falsehoods were not grossly irresponsible, a defendant cannot rely on information it has shielded by invoking a privilege.[20]

[19] Although developed with respect to press reports, the Chapadeau standard has been applied in other contexts. See Sheridan v. Carter, 48 A.D.3d 444 (2d Dept. 2008).

[20] Collins v. Troy Publ. Co., 213 A.D.2d 879, 881 (3d Dept. 1995); Greenberg v. CBS Inc., 69 A.D.2d 693, 708 (2d Dept. 1979); see Baines v. Daily News L.P., 51 Misc. 3d 229, 233 (Sup. Ct. N.Y. Cty. 2015) (defendants not required to disclose source "as long as defendants do not exploit or benefit from the unavailability of the undisclosed evidence").

B&N erroneously argues that its "investigation" of the Executive Assistant's charge precludes as a matter of law a finding that the Press Release is actionable under Chapadeau. (Def. Br. 18) First, by asserting the attorney-client privilege, B&N barred review of most aspects of the investigation.[21] B&N directed witnesses not to disclose critical communications such as what the Executive Assistant told Keating or Feuer. (Pl. 56.1 ¶¶16-21) B&N cannot cherry-pick the few steps in the investigation defendant did not hide and expect a determination as a matter of law that B&N was not grossly irresponsible. Riggio's and the Executive Assistant's statements that the matter was resolved further undermine the credibility of B&N's contentions. (Pl. 56.1 ¶¶104-05).[22]

Even those portions of the investigation that B&N has not shielded by privilege reveal at best a slipshod job not complying with generally followed procedures.[23] As a Board

[21] In Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482, 493 (S.D.N.Y. 2019), defendant argued successfully that privilege shielded in-house counsel's notes, memos and emails to himself and his testimony about interviewing the Executive Assistant; Keating's memorandum and testimony concerning her interview with the Executive Assistant; and Keating's memorandum concerning the apology meeting.

[22] Cf. Meloff, 240 F.3d at 146-47 (finding evidence of actual malice when supervisor "reassured [plaintiff], saying the [credit card] charges were 'no problem.' Yet, less than one week later, [the supervisor] sent an e-mail accusing" plaintiff of fraud.").

[23] B&N's slapdash inquiry is not comparable to the investigations (Def. Br. 17, 19) defendant cites. See Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 103 (2d Cir. 2000) ("[Outside counsel] interviewed approximately 85 current and former . . . employees and outside appraisers and reviewed 50,000 documents."); Post v. Regan, 677

member testified, Keating who had no relevant training, was not an appropriate investigator. B&N presents no evidence that it spoke with any of the more than a dozen female executives and other female employees (Pl. 56.1 ¶97) with whom Parneros had worked successfully for months. See O'Brien v Troy Publ. Co., 121 A.D.2d 794, 795-96 (3d Dept 1986) (fact issue as to gross irresponsibility where defendant did not seek patient's permission to speak with allegedly defamed doctor); Ocean State Seafood v. Capital Newspaper, 112 A.D.2d 662, 665 (3d Dept. 1985) (fact question under Chapadeau where "plaintiffs . . . were readily available for inquiry . . . and . . . such an inquiry would have disclosed" contrary facts).[24] Neither does defendant contend

---

F. Supp. 203, 209 (S.D.N.Y. 1988) ("The investigation was conducted over a two-month period. . . . It involved interviews of relevant parties and reviews of transactions and documents by inside and outside counsel, by staff and independent accountants, [and] by senior management."); Luisi v. JWT Group, Inc., 14 Media L. Rep. (BNA) 1732 (Sup. Ct. N.Y. Cty. 1987), aff'd, 138 A.D.2d 987 (1st Dept. 1988) (Table) ("This investigation . . . extended over a two month period, and was conducted by (1) [defendant's] financial, auditing and legal staff, (2) an independent audit committee and its legal counsel, and (3) Price Waterhouse and outside counsel."); Kamfar v. New World Restaurant Grp., Inc., 347 F. Supp. 2d 38, 47 (S.D.N.Y. 2004) (emphasis added) ("The undisputed evidence shows that the Proskauer attorneys . . . conducted an extensive investigation."); Mott v. Anheuser-Busch, Inc., 910 F. Supp. 868, 876 (N.D.N.Y. 1995), aff'd, 112 F.3d 504 (2d Cir. 1996) ("The investigation included interviews with all relevant parties, including plaintiff, and an extensive review of the books and records . . in Baldwinsville and St. Louis. . . . Defendants . . . voluntarily submitted . . . a 56-page report. . . .").

[24] B&N's citations (Def. Br. 16-17) are distinguishable. See Weber, 2000 WL 526726, at

that it reviewed any emails or other documents, generally the first step in any good faith investigation. (See p. 18 n.23, supra).

Similarly missing is any evidence that B&N investigated or even cared about Lindstrom's untrue complaints about how Parneros treated him. (Pl. 56.1 ¶35) Although long aware of the CFO's false contentions, no one in B&N management did anything or discussed the accusations with Parneros before invoking them as an excuse for the defamatory Press Release. Given Lindstrom's admitted animosity toward Parneros (id. ¶¶32-38), defendant acted with gross irresponsibility in failing to interview plaintiff or other relevant witnesses. See Thomas v. Journal Register Co., 24 A.D.3d 988, 990 (3d Dept. 2005) ("Although the record reveals that the reporter . . . did follow normal procedures . . . , the record also reveals a substantial and profound reason to doubt the information . . . thereby imposing a duty to inquire further. . . ."); Udell v. New York News, Inc., 124 A.D.2d 656, 657 (2d Dept. 1986) (same). That failure is particularly significant given B&N management's longstanding discontent with Lindstrom's performance (Pl. 56.1 ¶¶209-28), and his motivation to lie about Parneros. See Hogan v. Herald Co., 84 A.D.2d 470, 476 (4th Dept. 1982) (denying summary judgment under Chapadeau given "[defendant's] apparently casual questioning" of key witness and "failure to credit the flat denial" by another witness).

Finally, as B&N was well aware, the Potential Acquirer cited declining sales and defendant's failure to explain that decline adequately as why it withdrew from the deal. That explanation was provided not just by Parneros but by Lindstrom and the others on the B&N

---

*11 (no gross irresponsibility where key witness refused to speak to defendant); Ratajack, 178 F. Supp. 3d at 170 (defendant "spoke with a number of persons who were present" for the events at issue; other statements based on personal knowledge).

team. Not only did defendant ignore the motive of B&N executives to blame Parneros when the transaction failed; the Potential Acquirer described Parneros's behavior in the June 18 meeting as typical of their prior discussions after which the Potential Acquirer nonetheless made and then raised its bid. Without speaking to him, B&N scapegoated Parneros for negative comments he did not make and for the Potential Acquirer's withdrawal. (Pl. 56.1 ¶¶50, 51)

Other evidence also would permit the factfinder to conclude that B&N was grossly irresponsible in not inquiring further about the June 18 meeting: Riggio's hostility toward Parneros when the transaction failed; defendant's current reliance on documents that the Board apparently never reviewed; and B&N's failure to mention the June 18 meeting when plaintiff was fired. (Pl. 56.1 ¶¶44, 49, 188) B&N deliberately ignored substantial evidence that Parneros had not violated Company policies; defendant is not entitled to judgment under Chapadeau.

D. Defendant Has Not Demonstrated Plaintiff Must Forfeit Certain Damages

B&N's contention that plaintiff has not pled special damages (Def. Br. 20) is made too late and is wrong. Moreover, the Press Release, taken as a whole, as it must be, can be read by the factfinder as disparaging Parneros in his profession as a high-level officer of major retail businesses; the announcement is defamatory per se. Finally, significant evidence demonstrates that defendant's leadership knew or recklessly disregarded the falsity of their statements. Summary judgment on plaintiff's claim for special, presumed and punitive damages should be denied.

1) Plaintiff is Entitled to Economic Damages

In contending that Parneros failed to plead special damages, B&N fails to cite any case beyond the pleading stage.[25] Defendant had full discovery as to special damages, plaintiff's economic or pecuniary losses resulting from the Press Release. See Celle, 209 F.3d at 179.[26] Parneros answered B&N's interrogatory by specifying $6.6 million per year of lost compensation, approximately his total compensation at B&N, for the rest of his working life. (Pl. 56.1 ¶208) See Sadowy v. Sony Corp. of Am., 496 F. Supp 1071, 1076 (S.D.N.Y. 1980) (allegation of $50,000 annual salary loss sufficient to state special damages; "Plaintiff alleges that he has sought [subsequent] employment and . . . was unable to find any. Plaintiff's calculation of his lost income was reasonably based on his previous salary. . . .").

The Amended Complaint alleges: A "search firm executive told [Parneros] that his career was 'essentially over' given the announcement, and that even if Parneros were able to get some kind of employment . . . the work would not be anywhere near his prior level . . ." (Keane Decl., Ex. GG, ¶53, see id. ¶¶54-55)[27] The headhunter B&N deposed confirmed those allegations. (Pl. 56.1 ¶¶201-03)

---

[25] See Def. Br. 20 n.12.

[26] In Berwick v. New World Int'l, Ltd., No. 06 Civ. 2641(JGK), 2007 WL 949767, at *14 (S.D.N.Y. Mar. 28, 2007) (Def. Br. 20 n.12), which similarly defines special damages, the only arguably defamatory statement did not mention plaintiffs.

[27] Cf. Dooner v. Keefe, Bruyette & Woods, Inc., No. 00 Civ. 572 (JGK), 2003 WL 135706, at *5 (S.D.N.Y. Jan. 17, 2003) (Def. Br. 20 n.12) (in granting motion to dismiss, Court states: "The plaintiff does not allege that as a result of this [allegedly defamatory] statement she was unable to seek new employment, or that her career prospects suffered).

Parneros provided documentation of hundreds of unsuccessful inquiries and other proof that the Press Release crippled his ability to find another position. (Id. ¶208) Whether at an earlier stage B&N should have raised plaintiff's purported failure to plead special damages, that stage has passed. As Parneros demonstrated the economic harm the Press Release caused him, B&N is not entitled to summary judgment on its after-the-fact contention about pleading special damages. Cf. Yazurlo, 2018 WL 4572255, at *4 ("Plaintiff . . . sufficiently alleged slander per se . . . that the statements injured Plaintiff in his profession, costing him at least one job offer and other future opportunities.")[28]

2) Defendant is Liable for Defamation Per Se

The Press Release also constitutes defamation per se. The standard is a flexible one, easily met here. See Celle, 209 F.3d at 179 (quoting Davis, 754 F.2d at 82) (emphasis in original) ("'[A] writing which tends to disparage a person in the way of his office, profession or trade' is defamatory per se . . . .") As the Court of Appeals stated in November, 13 N.Y.2d at 178: "Plaintiff is a professional man. If, on their face, they (the words) are susceptible in their ordinary meaning of such a construction as would tend to injure him in that [professional] capacity, they are libelous per se." The Press Release contained such words concerning Parneros who had enjoyed high level positions and an unblemished record. (Pl. 56.1 ¶¶201, 206-07)

Defendant improperly truncates the Press Release as referring only to "violations of Company policies" (Def. Br. 20) and claims that the announcement, as a matter of law, does

[28] Parneros is also entitled to actual damages for non-economic harm to his reputation, mental anguish, and humiliation. See Bouveng v. NYG Capital LLC, 175 F. Supp. 3d 280, 335 (S.D.N.Y. 2016); Cantu v. Flanigan, 705 F. Supp. 3d 220, 227-28 (E.D.N.Y. 2010).

not disparage plaintiff in his profession or business. B&N is wrong. The announcement clearly underscores—without reference to other proof—the serious nature of the purported wrongdoing. The Press Release describes the immediate firing of a CEO and paints misconduct so significant that B&N consulted with a major law firm, denied Parneros severance, and dismissed him from the Board. The Press Release can fairly be read to disparage plaintiff in his profession as a high-level executive. See Robertson v. Doe, No. 05 Civ. 7046, 2009 WL 10676484, at *3 (S.D.N.Y. Dec. 17, 2009) ("Given that [plaintiff] is a well-known figure on Wall Street . . . the title of the [untrue] Article alone . . . illustrates how a misstatement about [his] view of the markets could" disparage him in his profession.).

B&N erroneously argues that to constitute defamation per se (Def. Br. 20-21), disparagement in a plaintiff's professional capacity must be the only possible construction. Not so. See Lucking, 2003 WL 23018787, at *4 (denying motion to dismiss defamation per se claim where "defendants' interpretation of the passage is but one of several. . . .") Rather than supporting defendant's position, the sole case B&N cites, Aronson, 65 N.Y.2d at 592 (Def. Br. 20), stands for the proposition that a plaintiff's profession is relevant to determining whether the defamatory words injured him in that capacity. The Court stated: "Whether . . . plaintiff fails 'to hand in time sheets' or 'is neglectful' is no reflection upon her performance as a linguist or her ability to be a good writer." Id. at 594. In contrast, because fitness for a high-level executive position is at issue, statements that plaintiff's purported violations required his removal from the Board, advice from a major law firm, and denial of severance may fairly be read to malign him in that profession and constitute defamation per se. See Grayson v. Ressler & Ressler, 271 F. Supp. 3d 501, 517-18 (S.D.N.Y. 2017) (statements including "lack of diligence" accused attorney of unprofessional conduct and could constitute defamation per se); Parris v. New York

City Hous. Auth., 364 F. Supp. 3d 284, 291 (S.D.N.Y. 2019) (denying motion to dismiss where plaintiff called a "problem employee" and "a trouble maker.").[29]

3) Defendant Acted with Malice

Parneros has shown specific damages for economic injury and non-pecuniary actual damages. In addition, he has demonstrated evidence that would permit the factfinder to conclude that B&N acted with both actual and common law malice. Summary judgment should be denied on plaintiff's claims for presumed damages for defamation per se and punitive damages.

A defendant has acted with actual malice when it knowingly or recklessly disregarded that its defamatory statement was false. Prozeralik v. Capital Cities Commc'ns, Inc., 82 N.Y.2d 466, 474 (1993).[30] Relevant evidence includes whether "there are any obvious reasons to doubt the accuracy of defendant's source's report," Stern v. Cosby, 645 F. Supp. 2d 258, 278 (S.D.N.Y. 2009), and whether there is evidence indicating "ill will and personal animosity." Celle, 209 F.3d at 186. The "Court may consider . . . evidence of actual malice in the aggregate." Stern, 645 F. Supp. 2d at 278.

---

[29] B&N's citations (Def. Br. 20 n.12) are not to the contrary. See Thai, 726 F. Supp. 2d at 335-36 (citing security reasons for denying plaintiff a "swipe card" did not target or malign her as a bookkeeper); Nunez v. A-T Fin. Info., Inc., 957 F. Supp. 438, 441 (S.D.N.Y. 1997) (not defamatory per se to contend the plaintiff was unwilling to go to extraordinary lengths generally not required to achieve sales).

[30] Defendant waived the affirmative defense of qualified privilege. (Transcript of Proceeding Before Magistrate Judge Gorenstein, Dkt. No.125 at 62-63).

There is evidence from which a factfinder could infer "that defendant knew or suspected" that the Press Release was untrue. Prozeralik., 82 N.Y.2d at 475. The investigation that led to the false statements in the Press Release was anything but "thorough and reasonable." (Def. Br. 21)[31] Actual malice can also be inferred from B&N's previously ignoring the foibles it now contends merited a defamatory announcement. Defendant had paid no attention to the CFO's complaints about Parneros or to Parneros's purportedly longwinded presentations to the Potential Acquirer; Riggio declared the issue of the Executive Assistant "closed" well before the Press Release was issued. (Pl. 56.1 ¶¶32-38, 48-50, 62, 104-05, 160, 174) Those matters became important only when Riggio wanted to prompt the Board to fire Parneros. See Meloff, 240 F.3d at 147 (evidence of actual malice in accusing plaintiff of fraud included plaintiff's history of having "paid . . . expenses using the [credit] card and reimburs[ing] [defendant] without incident.") Similarly demonstrating reckless disregard for the truth is evidence (Pl. 56.1 ¶¶165, 175) that B&N knew that the potential acquisition failed for reasons largely unrelated to plaintiff's conduct in the June 18 meeting. See DiBella v. Hopkins, 403 F. 3d 102, 117 (2d Cir. 2005) (finding of actual malice supported by evidence that defendant "knew or should have known that the payment" to plaintiff "was for future services," not an improper "quid pro quo.")

Plaintiff's entitlement to punitive damages is supported by a showing of common law malice or ill-will. See Celle, 209 F.3d at 184. That determination requires examination of

[31] In Present v. Avon Prods., Inc., 253 A.D.2d 183, 188 (1st Dept. 1999) (Def. Br. 21), defendant "was commendably cautious and thorough in conducting its internal investigation. It . . . cross-checked the employees' accusations and compiled a significant file of supporting documentation. Several outside [witnesses] who had no motive to collude confirmed" defendant's conclusion.

"the relevant circumstances surrounding the dispute, including any rivalries and earlier disputes between the parties, . . . including threats . . . subsequent statements of the defendant. . . ." Id. (internal citations omitted).

Such proof (Pl. 56.1 ¶191) includes Riggio's comment before issuing the defamatory announcement, that they would make plaintiff's life "miserable" if plaintiff "[went] to the press." Also reflecting malice is Riggio's subsequent false statement to the Potential Acquirer (Pl. 56.1 ¶193) that plaintiff was fired for sexual harassment. See Dalbec, 828 F.2d 928 (punitive damages supported in part by evidence that defamatory statement "was made in retaliation for" plaintiff's prior accusations); DiBella, 403 F.3d 122 (punitive damage award supported in part by defendant's "repeat[ing] his [false] allegations about" plaintiff).[32] The factfinder reasonably could conclude that plaintiff has shown common law malice and is entitled to punitive damages.

II. DEFENDANT CANNOT DEFEAT AS A MATTER OF LAW THE GOOD FAITH AND FAIR DEALING CLAIM

B&N fired plaintiff ten days before over half a million dollars of equity was scheduled to vest pursuant to his contract. (Pl. 56.1 ¶¶89, 191)[33] Defendant exercised its

[32] Cf. Munoz v. Puretz, 301 A.D.2d 382 (1st Dept. 2003) (Def. Br. 21) (negligence of defendant landlord's not abating lead paint hazard did not support injured minor's punitive damage claim).

[33] Contrary to B&N's contention (Def Br. 25 n.17), Parneros does not rely solely on temporal proximity to demonstrate that the timing of his dismissal was arbitrary. See Bierce v. Town of Fishkill, 656 F.App'x 550, 553 (2d Cir. 2016) (denying summary judgment on retaliation claim involving temporal proximity and evidence of employer animus).

discretion to dismiss Parneros in an arbitrary fashion that deprived him of the contract benefit he had earned by hard work the prior year. By so timing his firing, B&N violated its duty of good faith and fair dealing "'not to act arbitrarily or irrationally in exercising that discretion.'" Fishoff v. Coty Inc., 634 F.3d 647, 653 (2d Cir. 2011) (quoting Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389 (1995)). Defendant fails to offer any reason for its rush to judgment.

While defendant cites provisions in the plan governing Parneros's equity, B&N tellingly omits the language giving the Committee discretion. (Pl. 56.1 ¶8)[34] In contrast to the compensation provisions B&N cites (Def. Br. 23-24),[35] the Plan has no time frame explicitly limiting the Committee's discretion; the implicit covenant claim does not conflict with any express contract language. See DeCiutiis v. Nynex Corp., No. 95 Civ. 9745(PKL), 1996 WL 512150 (S.D.N.Y. Sept. 9, 1996).[36] A reasonable person in Parneros's position would not have

[34] The Board's Compensation Committee administers the plan that controls Parneros's equity awards. (Keane Decl., Ex. O at B&N – 00001259, 1262) Ferarra and Van Der Zon are Committee Members. (Pl. 56.1 ¶8)

[35] See Woodward v. Reliance Worldwide Corp., No. 18-CV-9058, 2019 WL 3288152(RA) (S.D.N.Y. July 22, 2019) (plaintiff to be paid if fired within seven days of closing); Phoenix Capital Investments LLC v. Ellerston Mgt. Grp., L.L.C., 51 A.D.3d 549 (lst Dept. 2008) (transaction a year after specific time for plaintiff to receive finder's fee).

[36] B&N's citations (Def. Br. 23-24) are inapposite. See Schonfeld v. Wells Fargo Bank, N.A., 1:15-cv-01425(MAD/CFH), 2017 WL 4326057 (N.D.N.Y Sept. 27, 2017) (contract explicitly allowed the conduct alleged to breach the implicit covenant); Nautilus Neurosciences, Inc. v. Fares, No. 13 Civ. 1078(SAS), 2013 WL 6501692, at *6

expected his dismissal to be scheduled, for no apparent reason, just days before the vesting of an equity award he had earned by the prior year's work. See Longhi v. Lombard Risk Sys., Inc., No. 18-CV-8077 (VSB), 2019 WL 4805735, at *9 (S.D.N.Y. Sept. 30, 2019).

B&N had shown no hurry in dealing with any of the purported reasons for plaintiff's discharge. At least a month before firing Parneros, Riggio said the matter of the Executive Assistant complaint was "closed"; and the Executive Assistant said it was "over with." (Pl. 56.1 ¶¶103-05) According to the Potential Acquirer, plaintiff's conduct at the June 18 meeting was as it had been throughout the due diligence process, behavior well known over many months to Lindstrom. (Id. ¶158) See Fischkoff v. Iovance Biotherapeutics, Inc., No. 17 Civ. 5041, 2018 WL 4574890, at *7 (S.D.N.Y. July 5, 2018) (finding defendant's intent in violating implicit covenant could be inferred from evidence plaintiff "was never told how he had failed to meet" performance goals, and that defendant "never met with him" to review).[37] Equally long-term and well-known to the Board were Lindstrom's baseless complaints about Parneros. B&N has offered no reason for the suddenness of the dismissal that arbitrarily denied a significant portion of plaintiff's compensation. See Security Plans, Inc. v. CUNA Mutual Ins., 769 F.3d 807, 820 (2d Cir. 2014) (reversing summary judgment; "[o]n remand, the . . . implied covenant [claim] will depend, in large measure, on the defendant's reason for not revising the calculation.").

(S.D.N.Y. Dec. 11, 2013) (contract "expressly contemplates future stock issuances" alleged to breach implicit covenant).

[37] Wagner v. JP Morgan Chase Bank, No. 06 Civ. 3126(RJS), 2011 WL 856262, at *4 (S.D.N.Y. Mar. 9, 2011) (Def. Br. 24), involved no such evidence of bad faith.

Even if these purported reasons for Parneros's firing were true, which they are not, the factfinder could conclude that the Board's timing in acting on them was arbitrary. See Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., 41 A.D.3d 269 (1st Dept. 2007) ("Although the . . . Agreement made the . . . timing of deliveries subject to [defendant's] discretion, the implied covenant obligated [defendant] to exercise such discretion in good faith."); Sandler v. Montefiore Health Sys., Inc., No. 16-CV-2258(JPO), 2018 WL 4636835, at *16 (S.D.N.Y. Sept. 27, 2018) (implied covenant may have been violated by defendant's delay in alerting plaintiff to performance deficiencies).[38]

The decisionmakers' awareness of the coming equity award and Riggio's animosity at the possibility that Parneros might make his disagreement public (Pl. 56.1 ¶¶81, 89-92, 191), permit an inference that B&N did not act in good faith. See Wakefield v. N. Telecom, Inc., 813 F.2d 535, 540 (2d Cir. 1987) (finding trial issue on firing executive before consummation of commission-eligible sale). Summary judgment on the implicit covenant claim should be denied.

[38] B&N unsuccessfully tries to distinguish Maddaloni and Sandler as "involv[ing] a party's timeliness as to performance of a contract." (Def. Br. 24 n.15) That is what is at issue here: the timing of B&N's exercise of its discretion under plaintiff's contract.

CONCLUSION

For the foregoing reasons, defendant's motion should be denied.

Dated: New York, New York
January 15, 2020

VLADECK, RASKIN & CLARK, P.C.

By: /s Debra L. Raskin

Debra L. Raskin
Anne L. Clark
Vladeck, Raskin & Clark, P.C.
565 Fifth Avenue, 9th Floor
New York, New York 10017
(212) 403-7300

CERTIFICATION OF COMPLIANCE

Debra L. Raskin, a member of Vladeck, Raskin & Clark, P.C., attorneys for plaintiff and counterclaim defendant, 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 8,995.

Dated: New York, New York
January 15, 2020

/ Debra L. Raskin
Debra L. Raskin