SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT HON. RICHARD B. LOWE, III Justice

PART 56

S Rosenberg

- v -

HBO

INDEX NO. 601924/05

MOTION DATE 7/13/05

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/30/06

HON. RICHARD B. LOWE, III
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

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STEVEN ROSENBERG,

Plaintiff,

-against- Index No. 601924/05

HOME BOX OFFICE, INC., TIME WARNER INC.,
AND HOME BOX OFFICE, A DIVISION THEREOF,
SHELLEY D. FISCHEL, HAROLD AKSELRAD,
WILLIAM NELSON and JOHN DOES 1-4,

Defendants.

----------X

Hon. Richard B. Lowe, III:

In 2004, defendant Home Box Office, Inc. (HBO) conducted an internal investigation of potential improprieties at its Warner Channel business as part of its general compliance practices, which included those responsibilities imposed by the Sarbanes-Oxley Act (Public Company Accounting Reform and Investor Protection Act of 2002). As a result of this investigation, plaintiff Stephen Rosenberg was terminated from his positions as an Executive Vice President of HBO and President of HBO International for "Gross Misconduct" under his written employment agreement. Plaintiff commenced this action against defendants HBO, William Nelson (Nelson), its Chief Operating Officer; Harold Akselrad (Akselrad), its General Counsel; and Shelley D. Fischel (Fischel), its Executive Vice President, Human Resources; as well as against "John Does 1-4" and Time Warner, Inc. (Time Warner), a shareholder of HBO.

In Count I of the complaint, plaintiff alleges that HBO breached his employment agreement by first suspending him with pay on September 23, 2004, and then terminating him for Gross Misconduct on December 27, 2004. Plaintiff also brings additional claims for breach of the implied covenant of good faith and fair dealing (Count II against HBO), defamation (Count

III against all defendants), and promissory estoppel (Count IV against Nelson personally), and to include Time Warner as a defendant.

Defendants now move for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing Counts II, III and IV of the complaint, and dismissing Time Warner from this action as a defendant. For the reasons set forth below, the motion to dismiss those counts of the complaint is granted.

FACTS

Accepting the factual allegations of the complaint as true (Leon v Martinez, 84 NY2d 83 [1994]), the following facts emerge: plaintiff was employed by HBO as a senior executive for over 14 years (Complaint, ¶ 1). During that time, he was primarily responsible for HBO's internal operations, including its investment in the Warner Channel (id, ¶¶ 11-25). At all times, his employment was the subject of comprehensive written employment agreements (id., ¶¶ 13-21; Exhs A-G). At the time of his termination, plaintiff was subject to a written agreement dated as of January 1, 2000, which had been subsequently amended in writing three times (the Employment Agreement) (id., ¶ 15, Exhs D-G). The Employment Agreement, which attaches and expressly incorporates HBO's Standard Terms and Conditions (ST&C), covers the full spectrum of employment rights and duties, including termination and any right to severance (id.).

In the Employment Agreement, plaintiff expressly agreed that he would "perform and discharge well and faithfully all duties and responsibilities which may be assigned or delegated to [him] from time to time" and that he would "comply with all HBO policies and procedures" (id., Exh D, ¶ 2 [c] and ST&C, ¶ 1). One such policy with which plaintiff agreed to comply was the 2004 HBO Standards of Business Conduct, which sets forth the obligation that

"[a]ll employees are required to cooperate in investigations and refrain from interfering with or obstructing an investigation" (Aff of David E. Schwartz, Esq., Exh 2).

The Employment Agreement contemplated various grounds for termination of plaintiff's employment, including: (1) termination by HBO for "Gross Misconduct"; (2) termination by HBO without "Cause"; and (3) termination by plaintiff for "Cause" (ST&C, ¶ 3 [a] 3-5). In the event of termination by HBO for "Gross Misconduct," plaintiff would have no right to receive any further payments of base salary, bonuses or a severance package (Complaint, Exh D, ST&C, ¶ 3 [a] [3]). In the event of termination by HBO "without Cause" or a termination by plaintiff "for Cause," plaintiff would receive a severance package as provided in the ST&C (id., ¶ 3 [a] [4]-[5]).

In the fall of 2004, HBO commenced an investigation concerning allegations that it had received about the Warner Channel, a television channel distributed through Latin America, which was a business under plaintiff's direct supervision (id., ¶¶ 25, 38-39). In connection with this investigation, on September 23, 2004, plaintiff was told that a "whistle-blowing" accusation had been made concerning the relationship between AS Group, a company that sold advertising time for the Warner Channel, and executives of the channel and plaintiff (id.). This investigation was prompted, in part, by an accusation that plaintiff "allegedly owned the AS Group" (id., ¶ 27).

Plaintiff admits that he made an undisclosed investment in the AS Group (id., ¶ 30). When he later asked HBO's Chief Operating Officer for permission to make that investment and was refused, he supposedly "converted what had originally been intended as an equity investment in that company" into a "loan" (id.).

On September 23, 2004, the day plaintiff first learned of the investigation, he was "suspended with pay" pending the investigation (id., ¶ 28). Apparently because HBO's investigation was not concluded within the time frame originally estimated, on October 19, 2004, plaintiff wrote HBO, claiming that he considered HBO to be in material breach of his Employment Agreement, and purporting to terminate the Agreement "for cause," effective in 30 days (id., ¶ 42; Exh H).

Plaintiff alleges that, sometime after September 23, 2004, and while HBO's investigation was still open, Nelson

> promised and assured Rosenberg that in consideration of his long and valuable service to HBO, if HBO's 'investigation' ... yielded no material adverse facts not then or previously known to HBO, HBO would honor the [Employment] Agreement and make all payments and provide benefits to Rosenberg to which he would be entitled as if the [Employment] Agreement had been terminated for good reason by Rosenberg, or by HBO for reasons other than cause.

Id., ¶ 32. According to Rosenberg, based on this oral "promise" from Nelson, he "cooperated with HBO's purported 'investigation' to the full extent permitted by HBO" and, as a part of that cooperation, he "extended HBO's time to cure its defaults" under his termination letter to HBO of October 19, 2004 (id., ¶ 34).

On December 27, 2004, HBO notified plaintiff in writing that it had terminated his employment, effective immediately, for "Gross Misconduct" as defined in his Employment Agreement (id., ¶ 47, Exh K).

DISCUSSION

In support of their motion to dismiss the complaint, defendants argue that, at

most, the complaint presents only a claim against HBO for breach of the Employment Agreement[1], and that the three additional claims brought by plaintiff – breach of the implied covenant of good faith and fair dealing (Count II), defamation (Count III) and promissory estoppel (Count IV) – are defective, and must be dismissed. Defendants also argue that there is no basis to include Time Warner in this action under any theory or claim.

To survive a motion to dismiss, a complaint must allege facts that, if taken as true, would establish each and every element of a claim upon which relief can be granted (Campaign for Fiscal Equity, Inc. v State of New York, 86 NY2d 307 [1995]). However, a complaint is not entitled to any favorable inference where the facts pled of consist of "bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence" (Caniglia v Chicago Tribune-NY News Syndicate, Inc., 204 AD2d 233, 233-234 [1st Dept 1994]). In addition, when deciding a motion to dismiss under CPLR 3211 (a) (7), the court may consider documents referenced in or attached to the complaint (see Manchester Equip. Co. v Panasonic Indus. Co., 141 AD2d 616 [2d Dept], lv denied 73 NY2d 703 [1988]). Likewise, "where documentary evidence and undisputed facts negate or dispose of the claims in the complaint or conclusively establish a defense, dismissal may be granted pursuant to CPLR 3211 (a) (1)" (Silvester v Time Warner, Inc., 1 Misc 3d 250, 255 [Sup Ct, NY County 2003], affd 14 AD3d 430 [1st Dept 2005] [citations omitted]).

Here, construing the complaint in the generous manner to which it is entitled, this Court nevertheless concludes that Counts II, III and IV of the complaint fail to state a claim, and

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[1] Defendants do not challenge Count I of the complaint – a cause of action for breach of the Employment Agreement.

must be dismissed, and that Time Warner must be dismissed as a defendant from this action.

I. Breach of the Implied Covenant of Good Faith and Fair Dealing (Count II)

In Count II of the complaint, plaintiff alleges that HBO breached the implied covenant of good faith and fair dealing in two respects. Plaintiff alleges that HBO: (1) "affirmatively prevented" him from performing his duties during the period of his suspension (September 23 through December 27, 2004); and (2) improperly terminated the Employment Agreement (Complaint, ¶¶ 21, 60). These allegations, however, are insufficient to state an independent cause of action for violation of the implied covenant of good faith and fair dealing under New York law.

It is well established that "[s]ince a claim for breach of the implied covenant of good faith and fair dealing does not provide a cause of action separate from a breach of contract claim, it must be dismissed as a matter of law as redundant" (Computech Intl., Inc. v Compaq Computer Corp., 2002 WL 31398933, *4 [SD NY 2002] [citations omitted]; see also Canstar v J.A. Jones Constr. Co., 212 AD2d 452 [1st Dept 1995]). As more fully explained in O'Hearn v Bodyonics, Ltd. (22 F Supp 2d 7 [ED NY 1998]), in which the Court dismissed an implied covenant claim *sua sponte*:

> Although not raised by either party, the Court observes that under New York Law. ... a claim for breach of an implied covenant of good faith and fair dealing does not provide a cause of action separate from a breach of contract claim; these [breach of an implied covenant] claims must be dismissed, as a matter of law, as redundant. Parties to an express contract are bound by an implied duty of good faith, but breach of that duty is merely a breach of the underlying contract.

Id. at 11 (citation and quotation omitted) (applying New York law); accord Frutico, S.A. de C.V.

v Bankers Trust Co., 833 F Supp 288, 300 (SD NY 1993) (applying New York law) (holding that implied covenant of good faith and fair dealing claim "necessarily fails because it is derivative of the Plaintiffs' cause of action for breach of contract").

Following this principle, New York courts consistently grant motions to dismiss where plaintiffs attempt to allege separate causes of action for breach of the implied covenant of good faith (see e.g. Teevee Toons, Inc. v Prudential Sec. Credit Corp., LLC, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of the implied covenant of good faith because it was "redundant" of breach of contract claim]; accord Engelhard Corp v. Research Corp., 268 AD2d 358 [1st Dept 2000] [same]; Business Networks of New York, Inc. v Complete Network Solutions, Inc., 265 AD2d 194 [1st Dept 1999] [same]).

Moreover, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breached is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (The Hawthorne Group LLC v RRE Ventures, 7 AD3d 320, 323 [1st Dept 2004], quoting Canstar v J.A. Jones Constr. Co., 212 AD2d at 453). Here, that intrinsic tie is manifest on the face of plaintiff's complaint. The first paragraph under the WHEREFORE clause combines his demand for judgment on the breach of contract and implied covenant claims, and makes clear that all the damages sought flow from the express Employment Agreement:

> WHEREFORE, Rosenberg demands judgment in his favor and against defendants as follows:
>
> A. on the first [breach of express contract] and second [breach of implied covenant] causes of action against HBO: awarding Rosenberg $15,000,000 representing [a combination of] Base Salary and benefits ... bonuses he

> would have received for 2004, 2005 and 2006 in accordance with the [Employment] Agreement ... [and] the value of Rosenberg's health, welfare and equity benefits ... .

Thus, the damages sought by plaintiff on these claims are identical. As such, plaintiff's cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed (see id.).

In response to the motion to dismiss, plaintiff does not even attempt to distinguish the case law establishing that there is no separate cause of action for breach of the implied covenant where, as here, plaintiff seeks the same damages in both his breach of contract and breach of implied covenant claims. Instead, plaintiff offers only two baseless arguments. First, plaintiff contends that the implied covenant claim should be permitted to remain, so that, in the event this case were to reach a jury, he could show that HBO acted with "animus" when it terminated his employment for Gross Misconduct (Pl Br, at 15). However, plaintiff does not cite a single case in support of his theory that pleading "animus" is an acceptable independent predicate for such a claim. Moreover, "animus" is not relevant to either a breach of contract, or breach of implied covenant of good faith claim (see Lawrence v CB Richard Ellis, Inc., 7 Misc 3d 59, 60 [App Term, 1st Dept 2005] [citation omitted] [granting motion to dismiss breach of the implied covenant of good faith claim, on ground that "although plaintiff may ascribe a bad motive to defendant's conduct in terminating his employment, '[a] claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim'"]).

Second, plaintiff argues that "[d]ismissal of the second cause of action would prejudice Rosenberg; its retention prejudices no one" (Pl Br, at 14). However, the existence of

prejudice, or lack thereof, is simply not a basis upon which a motion to dismiss should be measured.

Accordingly, Count II does not state a cause of action, and must be dismissed.

II. Defamation (Count III)

The alleged defamation is contained in two newspaper articles, and an unidentified, anonymous document that is attached to the complaint. The first newspaper article was a *Los Angeles Times* article, dated October 15, 2004. The entirety of plaintiff's allegation with respect to the *Los Angeles Times* article is set forth below, with the statements in bold reflecting the specific passages that plaintiff claims to be defamatory:

> **HBO Execs Suspended in Inquiry**
>
> The president of Home Box Office International ... [has] been suspended, pending an internal investigation into alleged self-dealing according to people familiar with the probe. ... **HBO lawyers and accountants conducted a surprise weekend audit of computer files at the Miami headquarters of Warner Channel Latin America, prompting the suspension the following Monday of Steven Rosenberg**, president of HBO International. ...
>
> **Rosenberg ... helped set up a firm called Advertising Services Group to sell advertising in Mexico, Venezuela, Argentina and Colombia for networks including Warner Channel, and steered business to the Venezuela-based company ...**
>
> **Early this year ... he [Rosenberg] terminated a contract with Sony Pictures Television International, which had handled ad sales for the [Warner] channel. Rosenberg then allegedly shifted the business to Advertising Services Group.** Sony declined to comment.
>
> ... Rosenberg [is] no longer involved with Warner Channel Latin America ...

Complaint, ¶ 39 (a).

It is clear from the full text of the article (see Schwartz Aff., Exh 4) that it was written by a *Los Angeles Times* reporter, based on a variety of sources. It is also clear that the reporter expressly distinguished between HBO and its other sources (id.). The three specific passage plaintiff has highlighted are attributed only to "people familiar with the probe," and not to any specific person, much less any of the named defendants (id.).

The only passage attributed to "HBO executives" states that "Rosenberg [is] no longer involved with Warner Channel Latin America" (id.). Plaintiff does not allege that this statement is defamatory (Complaint, ¶ 39 [a]). Thus, any defamatory implication in this *Los Angeles Times* article arises not from any statement attributed to HBO, but only from the text written by the reporter based on comments from unnamed sources.

The entirety of plaintiff's allegation with respect to the second article, one published by *The Miami Herald* on October 19, 2004, is set forth below, again with the statements in bold reflecting the specific passages that plaintiff claims to be defamatory:

> **HBO Bars Execs After Raid**
>
> ... Cable network HBO has suspended the president of HBO International and the Miami-based head of Warner Channel Latin America **on suspicion that they were steering ad contracts to their own company**.
>
> Steven Rosenberg, president of HBO International, and Alejandra Solett, general director of Warner Channel Latin America, a unit of HBO, **are no longer involved with the unit**, an HBO spokesman said.
>
> **The suspensions came after parent company Time Warner conducted a surprise raid of Warner Channel Latin America headquarters on Lagoon Drive last month** ...

> The company brought in forensic accountants and lawyers to examine records.
>
> Internal investigators are determining whether Rosenberg and Solett were partners in a company in Venezuela, **Advertising Sales Group, which handles Warner Channel's ad sales in Venezuela, Colombia and Mexico.**
>
> **Rosenberg and Solett have been romantically involved for some time violating company policy."**

Complaint, ¶ 39 (c).

This article, for the most part, republished material "first reported in the *Los Angeles Times*" (Schwartz Aff., Exh 5 [full text of article]). It repeats the statement attributed to an "HBO spokesman" that plaintiff is "no longer involved with the unit" (id.). Although this time, plaintiff does claim that this statement is defamatory, as set forth below, the statement itself is not.

As the final basis for his defamation claim, plaintiff relies on an anonymous document that plaintiff's counsel sent to HBO during the course of the investigation (Complaint, Exh I). This document is in Spanish, and contains no information as to its source or authorship, or even where or when it was published or distributed. The allegedly defamatory statements plaintiff selects from this anonymous document are as follows:

> **Steven Rosenberg ... [was] separated from ... [his] functions last week and ... [was] prohibited access to ... [his] offices and from communicating with ... [his] subordinates. ...**
>
> **The home office ordered a forensic auditing to investigate the extremely grave irregularities that have been going on at the channel for quite some time; a forensic auditing is also known as economic crime and is ordered when it deals with aggravated fraud and corruption within an organization, and it is specially oriented to detect frauds and are conducted by**

financial auditors and ex-police auditors that have specialized in the management of technique[s] of police interrogatories ...

Complaint, ¶ 39 (b) (alterations as set forth in the Complaint).

The passages appearing in bold are not attributed to any of the defendants. In fact, the anonymous document expressly states that HBO executives were not making any statements about this matter when it says "[c]omplete silence is kept among the executives of HBO about this investigation; however, in all of the industry knows of it and speculations exist" (id., Exh I).

Under New York law, a viable defamation claim must set forth facts supporting each of the following elements: (1) a false and defamatory statement of and concerning the plaintiff; (2) publication by the defendant of such statement to a third party; (3) fault on part of the defendant; and (4) injury to the plaintiff (Idema v Wager, 120 F Supp 2d 361 [SD NY 2000], affd 29 FedAppx 676 [2d Cir 2002]; Dillon v City of New York, 261 AD2d 34 [1st Dept 1999]). A plaintiff may not rely on general allegations, or on mere conjecture or speculation in asserting a defamation claim (see Alanthus Corp. v Travelers Ins. Co., 92 AD2d 830 [1st Dept 1983]). Rather, pursuant to CPLR 3016 (a), "[i]n an action for libel and slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally."

Applying this mandate, New York courts require pleadings specifically to state: (1) the individuals who made the alleged defamatory statements; (2) the individuals to whom the alleged defamatory statements were made; (3) the defamatory statements *in haec verba*; and (4) the date, time and place of the alleged publication (Ives v Guilford Mills, Inc., 3 F Supp 2d 191 [ND NY 1998]; District Council No. 9 v Reich, 2 Misc 3d 271 [Sup Ct, NY County 2003).

These particularity requirements are imposed to give fair notice to defendants of what they are alleged to have said (see Pappalardo v Westchester Rockland Newspapers, 101 AD2d 830 [2d Dept 1984], affd 64 NY2d 862 [1985]). Failure to articulate these elements mandates the summary dismissal of a defamation claim (see e.g. Skelly v Visiting Nurse Assn. of the Capital Region Inc., 210 AD2d 683 [3d Dept 1994]).

Thus, in order to bring a cause of action for defamation, plaintiff must "particularize the words uttered, as well as . . . the time, manner and persons to whom the publications were made" (Vardi v Mutual Life Ins. Co. of New York, 136 AD2d 453, 455 [1st Dept 1988]). However, the complaint does not comply with these requirements. The complaint does not specify what allegedly defamatory statements each defendant is supposed to have made, and does not identify any specific defendant that made a defamatory statement, the person to whom the statements were made, or the date, time and place of any such statements. Rather, it simply alleges that the statements it excerpted from two newspaper articles and an anonymous document attached to the complaint are defamatory.

Specifically, despite the fact that the statements quoted in the complaint are not attributed to any of the defendants, the complaint seeks to impose blanket liability on all these defendants by setting forth possible ways in which some defendant could have been connected with the articles. For example, in paragraph 39, plaintiff alleges that one or more of "the defendants Fischel and Akselrad, and upon information and belief, each of the other defendants, through and by their agents and/or employees" undertook one or more of the following actions: "authorized, permitted, wrote and/or re-wrote and/or edited and uttered statements for release" by one or more of the following media outlets: "*Los Angeles Times, The Financial Times, The*

Miami Herald, and on the world-wide web" (Complaint, ¶ 39). In succeeding paragraphs, plaintiff groups all defendants, including John Does 1-4, together, and speculates that, either "directly or through their employees or agents" (id., ¶¶ 39, 63), they might have done something included in a broad spectrum of conduct ranging from active conduct (utterance, id., ¶ 39), to purely passive omissions (e.g., "allowed to be published," or "failure to refute," id., ¶¶ 67-70).

Under these circumstances, it is impossible for defendants to have adequate notice of which particular defendants made the alleged defamatory remarks, to whom such remarks were made, and the circumstances under which such statements were made. These defendants are not the newspapers that published the articles or the reporters who wrote them, and the passages the complaint claims are defamatory do not identify any speaker (much less a defendant) by name (see Bell v Alden Owners, Inc., 299 AD2d 207, 208 [1st Dept 2002], lv denied 100 NY2d 506 [2003] [affirming dismissal of a defamation claim where plaintiff alleged defamatory remarks were "made by unknown persons to certain unspecified individuals, at dates, times and places left unspecified"]). Accordingly, plaintiff's cause of action for defamation must be dismissed (see id.; see also Gill v Pathmark Stores, Inc., 237 AD2d 563 [2d Dept 1997]; Monsanto v Electronic Data Sys. Corp., 141 AD2d 514 [2d Dept 1988]).

Moreover, plaintiff fails to appreciate the distinction between the responsibility of a newspaper for the words it publishes, as compared to the liability of someone who might have been consulted as one of the reporter's sources for the words in the article written by the reporter. Under New York law, the news articles at issue in this case are not sufficient to state a claim against any defendant in this case who, at the very most, might have been one of the reporter's sources (see Jee v New York Post Co., 176 Misc 2d 253, 256 [Sup Ct, NY County 1998], affd

260 AD2d 215 [1st Dept], lv denied 93 NY2d 817 [1999] [granting summary judgment to individual who may have provided information to a news reporter where "none of the statements complained of are attributable to him and he did not contribute to the writing or publication of the articles in question"]).

In addition, under New York law, defendants are not responsible for statements attributable to a newspaper reporter, that they themselves did not write or publish. "One who makes a defamatory statement is not responsible for its recommunication without his authority or request by another over whom he has no control" (Hoffman v Landers, 146 AD2d 744, 747 [2d Dept 1989], citing Schoepflin v Coffey, 162 NY 12 [1900]; see also Sassower v Finnerty, 96 AD2d 585 [2d Dept 1983], appeal denied 61 NY2d 985 [1984]; Jee v New York Post Co., 176 Misc 2d 253, supra])

For example, in Grieve v Barclays Capital Sec., Ltd. (1999 WL 1680654 [Sup Ct, NY County 1999]), a case directly on point, a former employee brought a defamation action against his former employer based on articles published by three separate media outlets that discussed the employer's investigation, and the employee's resultant separation from the company. In dismissing this defamation claim, the court explained that two of the articles did not:

> set forth who or what their sources were regarding the reasons for [the plaintiff's] departure from employment, and neither article sets forth the precise statements allegedly made by defendants. While [plaintiff] assumes the statements were made by ... [a company] spokesperson who is quoted in [a third article], there is no basis for such an assumption.

Id. at *5; see also Khan v New York Times Co., 269 AD2d 74, 80 (1st Dept 2000) (reversing

denial of summary judgment since the article at issue was "based on allegedly defamatory statements that simply cannot be attributed to defendants," and because "[i]t is axiomatic that a defendant cannot be held liable for a libelous statement that it did not write or publish").

The same is true in this case, as no actionable statements set forth in the newspaper articles can be attributed to any of the defendants (see Jee v New York Post Co., 176 Misc 2d at 256 [no claim against individual where "none of the statements complained of are attributable to him"]). Plaintiff's reliance on selected quotes from the anonymous document fares no better. This document fails to attribute a single statement to HBO, and, indeed, expressly says that HBO executives are maintaining strict silence. Further, the statements in bold are not attributed to any specific source at all.

Plaintiff's defamation allegations are also insufficient because they do not identify the dates, times, or places that any defendant allegedly made any defamatory statement (see Bell v Alden Owners, Inc., 299 AD2d at 208 [defamation claim dismissed where allegations were "made by unknown persons to certain unspecified individuals, at dates, times and places left unspecified"]; Dillon v City of New York, 261 AD2d 34, supra [dismissing defamation complaint for failure to specify time, place and manner of alleged defamatory communication]).

Likewise, plaintiff fails to allege the person to whom the allegedly defamatory statements were made. Dismissal is warranted on this basis alone, as such a failure "deprives the defendants' ability to respond to the claim" (Mobile Data Shred, Inc. v United Bank, 2000 WL 351516 [SD NY 2000] [dismissing defamation complaint because it failed to indicate to whom the defendant made allegedly defamatory statements]; see also Simon v 160 W. End Ave. Corp., 7 AD3d 318 [1st Dept 2004] [dismissing defamation complaint for failure to plead with

particularity to whom statements were made]).

Finally, even if plaintiff had pleaded with sufficient particularity regarding the statements attributed to HBO in the documents on which he relies, his defamation claim must nevertheless be dismissed because those statements are not defamatory. The statement in the *Los Angeles Times* article was "Rosenberg [is] no longer involved with Warner Channel Latin America, HBO Executives said" (Complaint, ¶ 39 [a]). *The Miami Herald* re-published the same statement that plaintiff is "no longer involved with the unit" (id., ¶ 39 [c]).

However, under New York law, "[t]he mere statement of discharge or termination from employment, even if untrue, does not constitute libel" (Chang v Fa-Yun, 265 AD2d 265, 265 [1st Dept 1999] [citation omitted] [reversing denial of motion to dismiss a defamation claim against plaintiff's former employer based on a statement published in a newspaper announcing plaintiff's termination as officer and director of a corporation]). Accordingly, numerous courts have dismissed defamation claims premised on statements that the plaintiff is no longer employed by his former employer (see e.g. Grieve v Barclays Capital Sec., Ltd., 1999 WL 1680654 at *6 [employer's statement that the employee "left the firm" was not defamatory]; see also Serratore v American Port Servs., Inc., 293 AD2d 464 [2d Dept 2002] [statement that employee was discharged was not libelous]; Miller v Journal-News, 211 AD2d 626, 627 [2d Dept 1995] [the terms "suspended" and placed on "administrative leave" were interchangeable and not defamatory, given the underlying facts]).

Plaintiff's defense of his defamation claim is primarily built on the erroneous contention that it is enough for him to set forth, *in haec verba*, the language from the third-party articles that he finds objectionable. However, the First Department has clearly stated that, in

addition to the defamatory words, a complaint must set forth the identity of the speaker, the identity of the listener, and the time, place and manner of the making of the allegedly defamatory statement (see Dillon v City of New York, 261 AD2d 34, supra; Bell v Alden Owners, Inc., 299 AD2d 207, supra). Here, the complaint utterly fails to allege any facts in satisfaction of these additional requirements. Under similar circumstances, courts do not hesitate to grant motions to dismiss defamation claims (see Travers v O'Keefe & Assoc., Inc., Sup Ct, NY County, July 10, 2000, Ramos J., Index No. 604463/99, slip op at 23] [granting motion to dismiss defamation claim where complaint "failed to name the place and manner of the allegedly false statements"]).

Plaintiff also argues that it is enough to allege that, in some unknown way, one of the defendants might have been a source for the press stories he finds defamatory, or somehow failed to prevent them from occurring. Specifically, plaintiff contends that two or more of the defendants wrote, edited, promoted, commented on or failed to prevent the publication of these articles, or otherwise uttered or permitted words that formed the bases for such articles (Pl Br, at 20). However, under New York law, pleading the reporter's words *in haec verba* cannot state a claim against a putative source for words not expressly attributed to him in the article (see e.g. Grieve v Barclays Capital Sec., Ltd., 1999 WL 1680654, supra [employee's defamation claim dismissed where press articles did not name sources for defamatory statements, and employee's assumption that employer might have been the source would not support a claim]; Economou v Coutts Bank (Switz.) Ltd., Sup Ct, NY County, April 26, 2001, Cahn J., Index No. 100476/00] [employee's defamation claim based on news reports of employer's investigation dismissed, because complaint did not set forth the exact words used by the defendant, and the text of the article made clear that the language in the article was either a paraphrase of statements made

from an unidentified official, or was gleaned by the reporter from the pleadings]).

Finally, plaintiff attempts to recast his defamation claim as one for injurious falsehood. However, the complaint does not contain a claim for injurious falsehood, and plaintiff may not amend his complaint to add a new legal theory via statements in a memorandum of law in opposition to a pending dispositive motion (see e.g. Rubin v Nine West Group, Inc., 1999 WL 1425364, *4 [Sup Ct, NY County 1999] [citation omitted] ["A claim for relief 'may not be amended by the briefs in opposition to a motion to dismiss'"]; see also 220 West 111th St., LLC v New York City Dept. of Fin., Sup Ct, NY County, Feb. 9, 2004, Index No. 115361/03 [rejecting attempt to plead a new cause of action via an affidavit in opposition to a motion for summary judgment]; Glaser v Highland Hosp. of Rochester, 131 NYS2d 728 [Sup Ct, Monroe County 1954] [holding that plaintiff cannot allege new cause of action by way of affidavit or bill of particulars]).

Accordingly, plaintiff's cause of action for defamation must be dismissed.

III. Promissory Estoppel (Count IV)

Plaintiff's promissory estoppel claim is based on the allegation that "Nelson ... promised ... Rosenberg that ... if HBO's 'investigation' ... yielded no material adverse facts not then or previously known to HBO, HBO would honor the [Employment] Agreement" (Complaint, ¶ 32). However, plaintiff cannot state a cause of action for promissory estoppel based on the alleged promises that Nelson made to him concerning severance payments because "New York does not recognize promissory estoppel as a valid cause of action in the employment context" (Miller v Citicorp, 1997 WL 96569, * 10 [SD NY 1997] [citations omitted]; see also Dalton v Union Bank, 134 AD2d 174 [1st Dept 1987] [granting motion to dismiss promissory

estoppel claim in an employment-related case under New York law]; Van Brunt v Rauschenberg, 799 F Supp 1467, 1473 [SD NY 1992] ["While Van Brunt has alleged each element of promissory estoppel, the claim is nevertheless dismissed" because "New York does not recognize promissory estoppel as a valid cause of action when raised in the employment context"]).

Plaintiff argues that his promissory estoppel claim for severance pay does not arise in the employment context because he "is not, in this cause of action, suing his employer, he is suing an individual, Nelson, who made a promise to him, and then failed to keep it" (Pl Br, at 26). However, it is clear from the face of the complaint that plaintiff is suing Nelson, HBO's Chief Operating Officer, for a promise he allegedly made on behalf of HBO concerning plaintiff's severance package under his Employment Agreement with HBO (Complaint, ¶¶ 8, 32). In particular, plaintiff alleges that Nelson promised that "HBO would honor the [Employment] Agreement," and provide the severance package under the Employment Agreement to plaintiff, subject to the satisfaction of certain conditions (id., ¶ 32). The complaint does not allege that Nelson promised that he would himself honor such agreement if HBO failed to do so. The opposing brief further underscores the point that Nelson was acting on behalf of HBO by arguing that "[i]t was within Nelson's power, as the chief operating officer of HBO (see Compl. ¶ 8) to make good on that promise, or not" (Pl Br, at 25). Clearly, the alleged promise related to an act to be performed in Nelson's corporate capacity.

Plaintiff also argues that Nelson, HBO's Chief Operating Officer, can be held personally liable for acts which were taken in Nelson's corporate capacity. This argument ignores the fact, however, that under New York law, an individual officer or employee is not personally liable for promises made in connection with his or her corporate duties (see It's All

Good, Inc. v International Creative Mgmt., Inc., 1995 WL 622511, *5 [SD NY 1995] [dismissing promissory estoppel claim against individual corporate officer]).

Under these circumstances, plaintiff cannot state a promissory estoppel claim against Nelson, and this cause of action must be dismissed.

IV. Time Warner

Defendants argue that Time Warner should be dismissed from this action because the complaint is devoid of any allegations that Time Warner engaged in any wrongdoing, and the mere existence of a parent-subsidiary relationship is a wholly insufficient basis to impose liability against it.

The complaint contains no allegations against Time Warner directly. Indeed, the only allegation in the entire complaint specifically referring to Time Warner states: "On information and belief, defendant [HBO] is a Delaware corporation and a subsidiary of defendant, Time Warner Inc."[2] (id. ¶ 6).

In his opposing brief, plaintiff states that he is seeking to hold Time Warner liable only for "defamation (and injurious falsehood)" (Pl Br, at 28). The sole basis for this contention is the allegation in paragraph 25 of the complaint which states "that the [whistle-blowing] accusation had been made to Time Warner, but that HBO wanted to deal with the issues and conduct a private investigation and was being allowed to do so." Plaintiff then argues that, by allowing HBO to investigate this accusation, Time Warner became responsible for the actions of HBO "based on concepts of vicarious liability and the principle of respondeat superior" (Pl Br, at

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[2] Time Warner is not HBO's immediate parent. It is the ultimate parent company of HBO, with several intermediary companies in the chain of ownership between Time Warner and HBO

29).

However, as a threshold matter, because plaintiff has not adequately pled a claim for defamation, there is no claim in the complaint upon which Time Warner could be held vicariously liable under any theory or concept.

Moreover, to the extent that plaintiff is seeking to impose vicarious liability on Time Warner merely because it is a parent company of HBO, such attempt is impermissible under New York law. The Court of Appeals has expressly held that:

> As a general rule, the law treats corporations as having an existence separate and distinct from that of their shareholders and, consequently, will not impose liability upon shareholders for the acts of the corporation. ... [and] such liability can never be predicated solely on the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary.

Billy v Consolidated Mach. Tool Corp., 51 NY2d 152, 163 (1980) (citations omitted). Based on this holding, in Kelly v Quotron Sys., Inc. (1993 WL 106048 [SD NY 1993]), the Court rejected an employee's attempt to hold her employer's corporate parent liable in a discrimination case, even though she alleged, like here, that the parent had allowed its subsidiary to conduct an investigation in a manner that harmed her:

> If facts such as these were found adequate to pierce the corporate veil, parent corporations would routinely be held responsible for the actions of their subsidiaries. The law of [New York] state does not contemplate or permit such a result.

Id. at *3.

Consequently, Time Warner must be dismissed from this action as a defendant.

The Court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that the motion to dismiss the complaint is granted, and Count II (breach of the implied covenant of good faith and fair dealing) is severed and dismissed against defendant HBO, Count III (defamation) is severed and dismissed against all defendants, Count IV (promissory estoppel) is severed and dismissed against defendant Nelson, and Time Warner is dismissed as a defendant from the complaint, with costs and disbursements to defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants William Nelson, Harold Akselrad, Shelley D. Fischel, "John Does 1-4" and Time Warner, Inc.; and it is further

ORDERED that the remainder of the action (Count I for breach of contract against defendant HBO) shall continue, and defendant HBO is directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry.

Dated: January 30, 2006

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.