UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MATTHEW CHRISTIANSEN,

Plaintiff,

-against-

OMNICOM GROUP INC., DDB WORLDWIDE COMMUNICATIONS GROUP INC. JOE CIANCIOTTO, PETER HEMPEL and CHRIS BROWN,

Defendants.

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DOCKET NO.: 15 cv 3440 (KPF)

MEMORANDUM OF LAW OF DEFENDANT, JOE CIANCIOTTO, IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

CIANCIOTTO JOINS IN CO-DEFENDANTS' MOTION TO DISMISS 1

ADDITIONAL ARGUMENTS

I. To the extent that claims are brought against Cianciotto under the ADA, such claims cannot be brought against individuals and should be dismissed 2

II. To the extent that New York State Human Rights Law claims are brought against Cianciotto as an employer, as opposed to an aider and abettor, such claims should be dismissed 3

III. To the extent Plaintiff has asserted a slander claim that is not time-barred, Plaintiff has not adequately identified the alleged slanderous communications, and therefore this claim should be dismissed 4

IV. To the extent Plaintiff has asserted a breach of contract claim against Cianciotto, such claim should be dismissed. alleged by Plaintiff is void for lack of an essential term – the effective date of the alleged raise 4

V. To the extent Plaintiff has asserted a labor law claim against Cianciotto, such claim must be dismissed 6

VI. Plaintiff's Complaint should be dismissed based on non-compliance with FRCP Rule 8, or, in the alternative, the Court should require Plaintiff to amend the Complaint and add a more definitive statement 7

CONCLUSION 9

PRELIMINARY STATEMENT

Defendant, Joe Cianciotto ("Cianciotto"), respectfully submits this memorandum of law pursuant to Federal Rules of Procedure 12(b)(1) and 12(b)(6) in support of his Motion to Dismiss Plaintiff's First Amended Complaint.

On July 22, 2015, Cianciotto's counsel emailed Plaintiff's counsel, stating:

> As a follow up to yesterday's court conference, please let me know which claims you are pursuing as against my client. As the Judge suggested, there is no reason for me to move to dismiss claims which you are not pursuing. Accordingly, please send me a list of which claims are being pursued against my client.

After receiving no response, Cianciatto's counsel followed up on August 4, 2015 and again on August 5, 2015. Plaintiff's counsel finally responded on August 12, 2015 (2 days before the motion was due), stating that only the Second, Fourth, Fifth, Seventh, Eighth, and Ninth causes of action were asserted against Cianciotto. By this time, the motion was almost completely drafted. For the sake of completeness, and because the Complaint is unclear, Cianciatto has not omitted his previously drafted responses to these causes of action from the instant motion.

CIANCIOTTO JOINS IN CO-DEFENDANTS' MOTION TO DISMISS

On June 22, 2015, Plaintiff filed his First Amended Complaint (the "Complaint"). On July 31, 2015, Defendants Omnicom Group, Inc., DDB Worldwide Communications Group, Inc., Peter Hempel, and Chris Brown (the "Corporate Defendants") filed a Motion to Dismiss Plaintiff's First Amended Complaint. (Dkt. 21-23). Cianciotto joins in the Corporate Defendants' Motion to Dismiss *in toto* – specifically, Cianciotto adopts the following arguments made by the Corporate Defendants:

- Plaintiff's ADA claim should be dismissed for failure to exhaust administrative remedies (Def. Mem., 7-9);

- Plaintiff's cause of action for "Title VII Stereotypical Animus" is a sexual orientation claim that is not actionable (Def. Mem., 9-10);
- Plaintiff's claim for constructive discharge must be dismissed because Plaintiff is still employed by DDB (Def. Mem., 10);
- The Title VII and ADA claims are based on events prior to January 2, 2014 and are therefore time-barred (Def. Mem., 11-12);
- Plaintiff's NYSHRL and NYCHRL claims based on sexual orientation discrimination must be dismissed as untimely (Def. Mem., 12-14);
- Plaintiff's disability discrimination claims fail under the NYSHRL and NYCHRL (Def. Mem., 14-15);
- Plaintiff's claim of slander *per se* must be dismissed as untimely (Def. Mem., 16-17);
- Plaintiff's claim for intentional infliction of emotional distress should be dismissed for failure to state a cause of action (Def. Mem., 17-18);
- Plaintiff's negligent supervision and retention claims are barred by the New York Workers' Compensation Law (Def. Mem., 19-20);
- Plaintiff's breach of contract claim fails for lack of jurisdiction and his New York Labor Law claim is duplicative of his breach of contract claim (Def. Mem., 20-21).
- All claims against Omnicom should be dismissed (Def. Mem., 21-23); and
- Plaintiff's claims against the individual defendatns should be dismissed (Def. Mem., 23-24).

Cianciatto's additional arguments are below.

ADDITIONAL ARGUMENTS

I. To the extent that claims are brought against Cianciotto under the ADA, such claims cannot be brought against individuals and should be dismissed.

The Corporate Defendants' brief notes that it is well-settled that there is no individual liability under Title VII because individual employees are not considered employers under the

definitions and regulations of the statute. (Def. Mem., 23). Cianciotto adds that this is also true of the ADA. Altman v. New York City Health and Hospitals Corp., 903 F. Supp. 503, 508 (S.D.N.Y. 1995) (rejecting individual liability under the ADA based upon reasoning "which is drawn from several other recent decisions barring individual liability under other federal antidiscrimination statutes"); Lane v. Maryhaven Center of Hope, 944 F. Supp. 158 (E.D.N.Y. 1996) (holding no individual liability under the ADA); Cerrato v. Durham, 941 F. Supp. 388 (S.D.N.Y. 1996) (same); Yaba v. Cadwalader, Wickersham & Taft, 931 F. Supp. 271 (S.D.N.Y. 1996) (same). Thus, to the extent any claims against Cianciotto pursuant to the ADA may be inferred from the Complaint, such claims should be dismissed.

II. To the extent that New York State Human Rights Law claims are brought against Cianciotto as an employer, as opposed to an aider and abettor, such claims should be dismissed.

An individual may be liable under the NYSHRL as an employer under Section 296(1), or as an "aider or abettor" under Section 296(6). See N.Y. Exec. Law §§ 296(1), (6). The New York Court of Appeals has held that an employee is not individually subject to suit under § 296 of the NYSHRL as an employer "if he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others." Patrowich v. Chemical Bank, 63 N.Y.2d 541, 542 (1984); see also Tomka v. Seiler Corp., 66 F.3d 1295, 1317 (2d Cir. 1995) (holding individual defendants not "employers" under the NYSHRL because they did not have an ownership interest in the corporate defendant, and did not have the power to hire or fire the plaintiff). Here, Plaintiff only alleges that Cianciotto was "employed by Defendant DDB and Omnicom as an Executive Creative Director from 2011 and Chief Digital Officer from April, 2013 to date." (Complaint, ¶ 14). Plaintiff does not allege Cianciotto had any ownership interest in DDB or Omnicom, and does not allege Cianciotto had the power to hire or fire him. Thus, to the

extent Plaintiff asserts a NYSHRL claim against Cianciotto as an employer, such claim must be dismissed.

III. To the extent Plaintiff has asserted a slander claim that is not time-barred, Plaintiff has not adequately identified the alleged slanderous communications, and therefore this claim should be dismissed.

The Corporate Defendants note in their brief that "to the extent Plaintiff asserts a slander claim based on the allegation that 'Cianciotto routinely accused him of having AIDS to another employee named Ryan [Murphy],' this claim is time-barred," because the comments could not have occurred within the one year statute of limitations due to Murphy having left the firm in March 2014. (Def. Mem., 16-17). Cianciotto further notes that even if Murphy's departure did not conclusively place Plaintiff's allegations outside the statute of limitations, his slander claim must still be dismissed based on the fact Plaintiff has not adequately identified the nature of the purported communication, or when it occurred. See Ives v. Guilford Mills, Inc., 3 F. Supp. 2d 191, 199 (N.D.N.Y 1998), citing Broome v. Biondi, 1997 LEXIS 1431 at * 2 (S.D.N.Y. 1997) (dismissing slander claim because plaintiff did not identify the specific conversations which were allegedly slanderous, and did not identify the specific places or times in which they occurred). Thus, Plaintiff's slander claim should be dismissed as time-barred. Alternatively, this claim should be dismissed because it is inadequately pled.

IV. To the extent Plaintiff has asserted a breach of contract claim against Cianciotto, such claim should be dismissed.

A. Plaintiff has not alleged a contract existed between himself and Cianciotto.

The elements of breach of contract under New York law are well established: (1) the existence of a contract between the plaintiff and the defendant; (2) performance of the plaintiff's obligations under the contract; (3) breach of the contract by the defendant; and (4) damages to the plaintiff caused by the defendant's breach. VFS Fin., Inc. v. Falcon Fifty LLC, 17 F. Supp. 3d

372, 379 (S.D.N.Y. 2014). Dismissal is warranted where the plaintiff has not alleged the existence of a contract between himself and the defendant. Excelled Sheepskin & Leather Coat Corp. v. Oregon Brewing Co., 2014 U.S. Dist. LEXIS 109226, *43 (S.D.N.Y 2014) (dismissing breach of contract claim because plaintiff failed to "establish the first element of [a] breach of contract claim, …the existence of a contract between [the plaintiff] and [the defendant]"); Hotel Acquarius B.V. v. PRT Corp., 1992 U.S. Dist. LEXIS 19603, *16 (S.D.N.Y. 1992) ("[I]f an entity is not a party to a contract, no valid breach of contract claim exists against that entity").

Here, Plaintiff does not allege that a contract existed between himself and Cianciotto. As Plaintiff alleges his breach of contract claim arises from a raise he did not receive (Complaint, ¶¶ 81-87)[1], any alleged contract necessarily would have been between Plaintiff and his DDB, and not between Plaintiff and Cianciotto. See Galbraith v. Lenape Regional High School Dist., 964 F. Supp. 889, 897 n.4 (D.N.J. 1997) (finding that there is no contractual relationship between plaintiff and a supervisor). Thus, to the extent Plaintiff asserts a breach of contract claim against Cianciotto, such claim must be dismissed because no contract between Plaintiff and Cianciotto was alleged.

B. The contract alleged by Plaintiff is void for lack of an essential term – the effective date of the alleged raise.

Contracts are unenforceable unless they cover all essential terms. Brookhaven Hous. Coalition v. Solomon, 583 F.2d 584, 593 (2d Cir. 1978); Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105, 109 (1981). The terms of an employee's compensation are essential contractual terms. Walker v. Serv. Corp. Int'l, 2011 U.S. Dist. LEXIS 39856, *25 (W.D. Va. 2011) (noting rate of pay is an essential term of an employment contract); Martin v. Southern Container

[1] The Complaint is erroneously numbered in several areas. The numbered paragraphs relating to Plaintiff's breach of contract claim correspond to pp. 24-25 of the Complaint.

Corp., 29 Misc. 3d 1217(A), 1217A (Suf. Cty. Sup. Ct. 2010) (noting salary terms are essential terms of an employment contract). Further, a contract which contains an agreement to agree in the future as to an essential term is considered incomplete and unenforceable. Sweeting v. Board of Coop. Educ. Servs., 83 A.D.2d 103, 112 (4th Dep't 1981). Agreements to consider future salary increases are unenforceable agreements to agree. Reiburn v. Roseman, 22 N.Y.2d 143, 145 (1968).

Here, Plaintiff alleges he was "promoted to Creative Director with more responsibilities and verball[y] promised by Defendants that came with a raise in salary," but that he did not receive a raise in salary until a year later. (Complaint, ¶¶ 81-87). But, Plaintiff does not allege Defendants ever agreed to an effective date for this salary increase. Plaintiff concedes that after he was allegedly promoted, he had ongoing discussions with the Defendants about when he would be given a raise, and was told by the Defendants that they were "working on [it], that it was "not an easy task," but that granting the raise was a "priority" and the request had been submitted. (Complaint, ¶ 84). Thus, no effective date was agreed upon.

Accordingly, to the extent a contract existed, it was either void because the effective date of the raise was an essential term which was never agreed upon, or unenforceable because the contract was merely an agreement to agree.

V. To the extent Plaintiff has asserted a labor law claim against Cianciotto, such claim must be dismissed.

A plaintiff cannot assert a statutory claim for wages under the Labor Law if he has no enforceable contractual right to those wages. Tierney v. Capricorn Investors, L.P., 189 A.D.2d 629 (1st Dep't 1993); Ghosh v. Neurological Servs. of Queens, P.C., 2015 U.S. Dist. LEXIS 12613, *9 (E.D.N.Y. 2015). As discussed above, Plaintiff's contractual claim was an

unenforceable agreement to agree (*see supra*). Thus, Plaintiff's labor law claim should be dismissed.

VI. Plaintiff's Complaint should be dismissed based on non-compliance with FRCP Rule 8, or, in the alternative, the Court should require Plaintiff to amend the Complaint and add a more definitive statement.

A. Dismissal pursuant to FRCP Rule 8

Dismissal of Plaintiff's Complaint is warranted based on his failure to comply with Rule 8 of the Federal Rules of Civil Procedure. Rule 8 is as follows:

> (a) Claim for Relief. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief…
>
> (d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.
>
> (1) In General. Each allegation must be simple, concise, and direct. No technical form is required.

Fed R. Civ. Proc. R. 8.

When a complaint fails to comply with Rule 8, the district court has the power, on motion or *sua sponte*, to dismiss the complaint. Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988). "Unnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage." Id. at 42; see also Ceparano v. Suffolk Cnty., 2010 U.S. Dist. LEXIS 134605, *3 (E.D.N.Y. 2010) ("prolix, unintelligible, speculative complaints that are argumentative, disjointed and needlessly ramble [are] routinely dismissed"). "Length may make a complaint unintelligible, by scattering

and concealing in a morass of irrelevancies the few allegations that matter. United States v. Lockheed-Martin Corp., 328 F.3d 374, 378 (7th Cir. 2003).

Dismissal is usually reserved for those cases in which the complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised. Salahuddin at 42. Just so here. The Complaint is anything but "short and plain" or "concise and direct." The Complaint is 38 pages long and comprised of 150+ paragraphs. Many of the paragraphs individually contain a litany of allegations, and the paragraphs are numbered incorrectly. The Complaint is so poorly written and organized that it is impossible to discern which causes of action are being asserted against each defendant. As a result, in the instant motion, Cianciotto was compelled to address every cause of action contained in the Complaint, despite the fact some causes of action may not be applicable to him. Thus, the Complaint is confusing, and it would be unfair for Cianciotto to be forced to file an Answer in response to same. Accordingly, dismissal is warranted.

B. Alternatively, the Court should order Plaintiff to provide a more definite statement as to the allegations set forth in the Amended Complaint.

In the event this Court determines the Amended Complaint should not be dismissed, Cianciatto requests, pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, a more definite statement setting forth the Plaintiff's allegations. Rule 12(e) provides that "[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514 (2002). As noted above, many of the paragraphs contained in the Amended Complaint individually set forth a litany of distinct allegations, it is unclear which causes of action are being asserted against each of the defendants, and the paragraphs are numbered incorrectly. Accordingly, the Court should order Plaintiff to amend the complaint, such that (a) each of

Plaintiff's allegations are set forth in a unique paragraph, (b) it is clear which causes of action are asserted against each of the defendants, and (c) the paragraphs are numbered consecutively.

CONCLUSION

Based on the foregoing, Cianciotto respectfully requests that the Court dismiss the Complaint with prejudice, and grant such other and further relief as the Court deems just and proper.

Dated: Carle Place, New York
August 14, 2015

Respectfully Submitted,

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_____/s/_____
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