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Defendants Kasowitz, Benson, Torres & Friedman LLP (“KBT&F” or the “Firm”), Aaron Marks (“Marks”) and Kim Conroy (“Conroy,” collectively with KBT&F and Marks, “Defendants”), respectfully submit this memorandum of law in support of their motion to dismiss the complaint (“Complaint” or “Compl.”)¹ of plaintiff Gregory Berry (“Plaintiff”) pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7).

PRELIMINARY STATEMENT

Plaintiff, an attorney, purports to assert claims against KBT&F, his former law firm, and two of its partners allegedly arising from his approximately eight months of employment with the Firm and the termination of his employment. However, all of Plaintiff’s claims are barred by a general release he signed in May 2011 when he accepted and received a severance package which included, among other things, a payment to him equal to two months’ salary. Accordingly, all of Plaintiff’s purported claims should be dismissed.

Just weeks prior to filing his Complaint, Plaintiff entered into a Confidential Separation Agreement and Release, dated May 10, 2011 (the “Separation Agreement”), pursuant to which, in exchange for the severance package from the Firm, Plaintiff agreed to “forever release and discharge” the Firm and each of its partners from “any and all charges, complaints, claims . . . causes of action . . . (‘Claims’) of any nature . . . including but not limited to, any Claims arising out of [his] employment by the Firm and the cessation of such employment”² (Compl. ¶ 103; Piesco Aff., Exh. B ¶ 8.) By executing the Separation Agreement, and in accordance with the broad release contained therein, Plaintiff waived all claims against the Firm, its partners and

¹ A true and correct copy of the Complaint is attached as Exhibit A to the affirmation of Joseph A. Piesco, Jr., Esq., dated September 14, 2011 (“Piesco Aff.”), submitted herewith in support of the Motion.

² A true and correct copy of the Separation Agreement is attached at Piesco Aff., Exh. B. Although the Separation Agreement is, by its terms, confidential, Plaintiff consented, in writing, to Defendants’ filing same in connection with the instant Motion.

others, including without limitation the fourteen purported causes of action in Plaintiff's Complaint.

Plaintiff's Complaint – filed in flagrant breach of the Separation Agreement – alleges that the Separation Agreement never was consummated or should be declared void or voidable on grounds of duress, undue influence, adhesion or unconscionability. (See Compl., Counts Ten – Fourteen.) These allegations are patently frivolous. In fact, Plaintiff was represented by experienced employment counsel when he considered and entered into the Separation Agreement, and Plaintiff acknowledged in Paragraph 24 of the Separation Agreement that he understood the Separation Agreement and executed it “voluntarily and without coercion.” Plaintiff had the option to refuse to sign the Separation Agreement and pursue his purported claims. Instead, he chose to enter into that agreement and accept the substantial financial and other consideration the Firm offered him.

All of Plaintiff's claims should be dismissed for the additional reason that, as shown below, they fail to state a cause of action. In addition, by asserting a claim for wrongful termination in violation of N.Y. Labor Law Section 740, notwithstanding that the claim is not properly pled, Plaintiff thereby irrevocably waived all of his other causes of action.

FACTUAL BACKGROUND

In September 2010, Plaintiff began at-will employment with the Firm as an associate. (Compl. ¶ 31; Piesco Aff. ¶ 3.) On May 10, 2011, following two warnings, KBT&F terminated Plaintiff's employment after determining that, among other things, he failed to exercise proper judgment with respect to his communications and interactions with other attorneys at the Firm³. (Id. ¶ 4.)

³ Plaintiff's Complaint refers to certain of these communications by him. (See, e.g., Compl. ¶ 47 (stating that document review is “preventing me from doing my real work” and asking “[m]aybe we can find a

Although KBT&F had no obligation to do so, on May 10, 2011, the Firm offered Plaintiff a separation package (the “Severance”) which provided for, among other benefits, severance pay of two months’ salary (\$26,666.67). (Compl. ¶ 88; Piesco Aff. ¶ 5.) Plaintiff was afforded 21 days to review and consider the Separation Agreement and was advised to consult with an attorney concerning the waivers contained in the Agreement. (Piesco Aff. ¶ 6.) Plaintiff also was afforded seven days after acceptance in which he could revoke the Separation Agreement. (Id.) Plaintiff, in fact, retained and was advised by Ethan Brecher, Esq., a partner and experienced employment lawyer with the firm Liddle & Robinson, L.L.P., in connection with considering and entering into the Separation Agreement. (Compl. ¶ 91; Piesco Aff. ¶ 7.)

On May 20, 2011, Plaintiff “sign[ed] and return[ed] the original Separation Agreement” to KBT&F. (Compl. ¶ 220.) The seven-day revocation period ended on May 27, 2011, and the Separation Agreement thereby became fully and irrevocably binding on Plaintiff and the Firm on Saturday, May 28, 2011 (the “Effective Date”). (Piesco Aff. ¶ 11.) On the next business day, Tuesday, May 31, 2011 (Monday, May 30, 2011 was Memorial Day), KBT&F advised Plaintiff by email that because the Effective Date of the Separation Agreement was past the deadline for the May 31, 2011 payroll, Plaintiff’s first severance payment would be made on June 15, 2011 – i.e., the “next payroll date following the Effective Date,” in accordance with the Separation Agreement (Id. ¶ 12 & Exh. C.) On June 1, 2011 KBT&F sent Plaintiff the fully executed Separation Agreement *via* first class U.S. mail. (Piesco Aff. ¶ 13.)

In exchange for the Severance, Plaintiff agreed in Paragraph 8 of the Separation Agreement (the “Release”) to release

first year that would benefit more from this [assignment]?”); id. ¶ 72 (“it has become clear that I have as much experience and ability as an associate many years my senior, as much skill writing, and a superior legal mind to most I have met.”).)

the Firm and each of the Firm's . . . partners, officers, managers, counsel, associates, employees, representatives, attorneys, [and] agents . . . from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred) ("Claims") of any nature whatsoever in law or equity, known or unknown, suspected or unsuspected, that [he] . . . ever had, now has, or hereafter can, shall or may have, for, upon, or by reason of any matter, cause or thing whatsoever through the date of this Agreement, including but not limited to, any Claims arising out of [his] employment by the Firm and the cessation of such employment, including but not limited to . . . any Claims arising under any contracts, express or implied, or any covenant of good faith or fair dealing, express or implied, or any tort, including without limitation intentional infliction of emotional distress, defamation, fraud and breach of duty, or any legal restrictions on the Firm's right to terminate employees

(Compl. ¶ 103; Piesco Aff., Exh. B ¶ 8.)

Plaintiff also acknowledged in Paragraphs 17 and 24 of the Separation Agreement that "the waivers [he has] made [t]herein are knowing, conscious and with full appreciation that [he is] forever foreclosed from pursuing any of the rights so waived," and that he "read" and "understand[s]" the Separation Agreement and that he "affixed [his] signature [t]hereto voluntarily and without coercion." (Piesco Aff., Exh. B ¶¶ 17, 24.) Plaintiff accepted and retained all of the payments he received from the Firm (on June 15, July 1, and July 15, 2011) as consideration for the release.⁴ (Piesco Aff. ¶ 14.) In addition, in Paragraph 9 of the Separation Agreement, Plaintiff "covenant[ed] and represent[ed] that [he has] not instituted, and will not institute, any complaints, Claims, charges or lawsuits . . . against the Firm, by reason of any claim present or future, known or unknown, arising from or related in any way to [his] employment with the Firm or the termination of such employment. . . ." (Piesco Aff., Exh. B ¶ 9.)

⁴ Plaintiff was also paid in full for any and all accrued vacation time. (Piesco Aff. ¶¶ 15, 16.)

ARGUMENT

I. The Complaint Should Be Dismissed in Its Entirety, as Plaintiff Contractually Released All Claims

Pursuant to the plain and unambiguous terms of the Separation Agreement, Plaintiff agreed to “forever release and discharge” the Firm and its constituents from “any and all charges, complaints, claims . . . (‘Claims’) of any nature whatsoever in law or equity, . . . including but not limited to, any Claims arising out of [his] employment by the Firm and the cessation of such employment” (Compl. ¶ 108; Piesco Aff., Exh. B ¶ 8.) Under both the general release and the specific releases contained therein, Plaintiff is barred from pursuing any claims against the Firm, including the claims asserted in the Complaint.⁵

Critically, the New York Court of Appeals recently affirmed the dismissal of a plaintiff’s complaint based on a similarly broadly-worded release, by which the plaintiff released “all manner of actions . . . whatsoever . . . whether past, present or future, actual or contingent, arising under or in connection with” the agreement at issue. Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C., No. 93, 2011 N.Y. Slip Op. 4720, 2011 N.Y. LEXIS 1383, at **5 (N.Y. June 7, 2011); accord Skluth v. United Merchs. & Mfrs., Inc., 163 A.D.2d 104, 105-07, 559 N.Y.S.2d 280, 282 (1st Dep’t 1990) (holding that terminated employee’s release of employer “‘from all liability of every kind, nature and description’ arising out of his employment . . . clearly and unambiguously releases defendant . . . as a matter of law . . . from any and all claims”).

⁵ The Release contains a very limited carveout permitting Plaintiff to “bring[] appropriate proceedings to enforce” the Separation Agreement. (Piesco Aff., Exh. B ¶ 8.) Count Fourteen purports to be a claim for breach of the Separation Agreement, but clearly it is not. The claim does not seek to “enforce” the Separation Agreement; rather, Plaintiff seeks to have it set aside. Therefore, Count Fourteen does not fall within the carveout. Moreover, the claim fails for the reasons set forth in Sections I(A)(4) and III, infra.

As the Court of Appeals recently held, “a valid release constitutes a complete bar to an action on a claim which is the subject of the release,” and a release “should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice.” Centro Empresarial, 2011 N.Y. LEXIS 1383, at **8-9 (noting that grounds for invalidating a release are “duress, illegality, fraud or mutual mistake”) (quoting Global Minerals v. Holme, 35 A.D.3d 93, 98, 824 N.Y.S.2d 210 (1st Dep’t 2006); Mangini v. McClurg, 24 N.Y.2d 556, 563, 249 N.E.2d 386, 301 N.Y.S.2d 508 (1969)).

As set forth below, there clearly is no such “injustice,” given that Plaintiff is an attorney, was advised by experienced employment counsel in considering and entering into the Separation Agreement, and accepted and retained all of the monetary and other severance benefits conveyed under the agreement.

A. Plaintiff’s Purported Claims Seeking to Set Aside the Separation Agreement Fail as a Matter of Law

On a motion to dismiss a plaintiff’s claims pursuant to CPLR 3211(a)(5), a “signed release shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release.” Centro Empresarial, 2011 N.Y. LEXIS 1383, at **9 (quotation and citation omitted). Because Plaintiff does not – and cannot – establish the elements of a claim for duress, undue influence, unconscionability or adhesion, the broad release of claims in the Separation Agreement “constitutes a complete bar” to the claims alleged in the Complaint. See id. (affirming dismissal of plaintiff’s claims due to release); accord Blum v. Perlstein, 47 A.D.3d 741, 851 N.Y.S.2d 596 (2d Dep’t), appeal denied, 11 N.Y.3d 702, 864 N.Y.S.2d 389 (2008).

1. Plaintiff's Claim That the Separation Agreement Was Not Accepted by KBT&F Is Baseless

In Count Eleven, Plaintiff seeks a declaratory judgment that the Separation Agreement was not properly consummated and is not enforceable on the purported ground that he “made a counter-offer by signing and returning the original Separation Agreement” to KBT&F, and that he “never received acceptance from KBT&F of his counter-offer.” (Compl. ¶¶ 220-21.)

Plaintiff's claim is demonstrably false. On May 31, 2011, Plaintiff was advised by email that KBT&F had received the Separation Agreement executed by Plaintiff, and notified Plaintiff that the first severance payment under the Separation Agreement would be made on June 15, 2011. (Piesco Aff. ¶ 12 & Ex. C.) On June 1, 2011, KBT&F sent Plaintiff, by first class mail, a fully executed copy of the Separation Agreement, and that mailing never was returned to KBT&F as undeliverable. (*Id.* ¶ 13.) See Wester v. Casein Co. of Am., 206 N.Y. 506, 513 (1912) (New York follows “mailbox rule,” under which acceptance of offer occurs upon mailing); Buchbinder Tunick & Co. v. Manhattan Nat'l Life Ins. Co., 219 A.D.2d 463, 466, 631 N.Y.S.2d 148, 151 (1st Dep't 1995). Moreover, KBT&F made the severance payments agreed to in the Separation Agreement (on June 15, July 1, and July 15, 2011), and Plaintiff accepted and kept all of these payments. See Pallonetti v. Liberty Mut., No. 10 Civ. 4487, 2011 U.S. Dist. LEXIS 14529, at *16-17 (S.D.N.Y. Feb. 11, 2011) (accepting severance rendered release valid and enforceable); Farrell v. Title Assocs., Inc., No. 03 Civ. 4608, 2004 U.S. Dist. LEXIS 2508, at *16-18 (S.D.N.Y. Feb. 19, 2004) (same).

Accordingly, the Court should hold that the Separation Agreement is enforceable as a matter of law.

2. Plaintiff's Economic Duress Claim Fails as a Matter of Law

In Count Twelve, Plaintiff requests that the Court declare the Separation Agreement “void for economic duress and undue influence.” (Compl. ¶¶ 230-32.) This claim is also frivolous.

Under New York law, a “party seeking to avoid a contract because of economic duress shoulders a heavy burden.” Pallonetti, 2011 U.S. Dist. LEXIS 14529, at *13-14 (quoting Nasik Breeding & Research Farm Ltd. v. Merck & Co., 165 F. Supp. 2d 514, 527 (S.D.N.Y. 2001)). The party must establish a “(1) a threat, (2) which is unlawfully made, and (3) causes involuntary acceptance of contract terms,⁶ (4) because the circumstances provide no other alternative.” Id. (footnote added).

Plaintiff's claim fails as a matter of law. First, Plaintiff's Complaint does not allege any “threat” made by the Firm. Plaintiff merely alleges that he was in financial straits, and that the Firm purportedly knew, or should have known, that he needed money, and used such knowledge as part of some unspecified “coercive tactics” to procure Plaintiff's release of claims. (See Compl. ¶ 227-31.) In any event, a “threat” that a terminated employee will not receive severance pay – severance pay the employer is in no way obligated to offer or pay – unless he/she executes a release of claims is not an “unlawfully made” threat. See Pallonetti, 2011 U.S. Dist. LEXIS 14529, at *13-14 (dismissing, on the pleadings, plaintiff's claim for economic duress in seeking to void severance agreement); see also Gubitv v. Sec. Mut. Life Ins. Co., 262 A.D.2d 451, 452, 692 N.Y.S.2d 139, 140 (2d Dep't 1999) (holding that plaintiff's assertion of duress “cannot be maintained” where the alleged threat “was not illegal”).

⁶ Plaintiff alleges that he was the “offeror” of the Separation Agreement. (See Compl. ¶¶ 220-21.) As the offeror, Plaintiff cannot possibly establish he involuntarily accepted the contract terms because he set the terms himself.

Second, a terminated employee's allegation that his supposed financial straits necessitated signing a severance agreement is not sufficient to state a claim for economic duress.⁷ See Farrell, 2004 U.S. Dist. LEXIS 2508, at *16-18 (“While the Court is sympathetic to [plaintiff’s] need to buy groceries and pay rent, that need is legally inadequate to state a claim of duress.”); Orix Credit Alliance, Inc. v. Hanover, 182 A.D.2d 419, 419, 582 N.Y.S.2d 153, 154 (1st Dep’t 1992) (“[F]inancial or business pressure of all kinds, even if exerted in the context of unequal bargaining power, does not constitute economic duress.”).

Finally, Plaintiff cannot claim that he had no alternative to entering into the Separation Agreement. Plaintiff, who was represented by counsel, could have refused to sign the agreement (and reject the benefits thereunder) and instead pursued his purported claims against the Firm. See Pallonetti, 2011 U.S. Dist. LEXIS 14529, at *14; Nasik, 165 F. Supp. 2d at 527; Reid v. IBM Corp., No. 95 Civ. 1755, 1997 U.S. Dist. LEXIS 8905, at *22-23 (S.D.N.Y. June 24, 1997) (“Courts have found this option – turning down the additional severance and pursuing legal claims – to be a reasonable alternative, even if a hefty financial incentive is offered for signing the Release.”). Similarly, the Complaint does not plead the requisite elements of undue influence, which “requires unfair persuasion by a person who, because of his relation to the victim, is justifiably assumed by the victim at the time to be one who will not act in a manner that is inconsistent with the victim’s welfare.” Id. at *20 (quoting Joseph v. Chase Manhattan Bank, N.A., 751 F. Supp. 31, 34 (E.D.N.Y. 1990)). Plaintiff does not – and cannot – identify any such person.

⁷ Plaintiff alleges that he was under economic duress due to his financial situation at the time of his termination. (See Compl. ¶¶ 227-28.) It is worth noting that Plaintiff alleges that prior to joining KBT&F he had “founded . . . an internet company” and “conquer[ed] Silicon Valley” (Id. ¶¶ 17-18.)

3. Plaintiff's Claims of Unconscionability and Adhesion Are Meritless

In Count Thirteen, Plaintiff requests that the Court declare the Separation Agreement void for unconscionability and because it purportedly is an adhesion contract. Under New York law, to void a contract for unconscionability, the plaintiff must demonstrate that the contract “is so grossly unreasonable or unconscionable in light of the mores and business practices of the time and place as to be unenforcible [sic] according to its general terms.” Dr. Christine Nayal v. HIP Network Svcs., 620 F. Supp. 2d 566, 571 (S.D.N.Y. 2009) (quoting Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 534 N.E.2d 824, 828, 537 NY.S.2d 787 (1988)). The burden is on the party challenging the contract to establish that it is “both procedurally and substantively unconscionable.” Id. Procedural unconscionability “concerns the contract formation process and the alleged lack of meaningful choice.” Id. (citing State v. Wolowitz, 96 A.D.2d 47, 468 N.Y.S.2d 131, 145 (2d Dep’t 1983)). Substantive unconscionability “looks to the content of the contract, per se.” Id. Plaintiff cannot establish either.

First, the Separation Agreement is not procedurally unconscionable. As noted above, Plaintiff had weeks to consider the Separation Agreement, signed the agreement after receiving the advice of counsel, and clearly had the option to choose to pursue his legal claims instead of accepting the Severance offered by the Firm. Even accepting as true Plaintiff’s allegations that KBT&F stated that the Separation Agreement was “take it or leave it,” or that the “Separation Agreement is a standardized form,” (Compl. ¶¶ 238-40), these allegations fail as a matter of law to establish procedural unconscionability. Nayal is squarely on point. In that case, the court rejected an employee’s attempt to void a “form contract offered on a ‘take-it-or-leave-it’ basis,” recognizing that such circumstances are “not sufficient under New York law to render the provision procedurally unconscionable.” 620 F. Supp. 2d at 571-72 (collecting cases); see also

Anonymous v. JP Morgan Chase & Co., No. 05 Civ. 2442, 2005 U.S. Dist. LEXIS 26083, at *16-19 (S.D.N.Y. Oct. 31, 2005) (same).⁸

The Separation Agreement also is not substantively unconscionable. Plaintiff received, accepted and retained a substantial monetary benefit which the Firm was under no obligation to offer or pay – in the form of two months’ severance for a total of \$26,666.67 – in exchange for a release of claims relating to his at-will employment and the termination thereof. Cf. Gillman, 73 N.Y.2d at 12, 534 N.E.2d at 829, 537 N.Y.S. 2d at 792 (affirming determination that contract terms were not substantively unconscionable because terms “were not so overbalanced” in favor of defendant); see also Pallonetti, 2011 U.S. Dist. LEXIS 14529, at *13 (holding that terminated employee who received severance pay in exchange for release of claims could not establish substantive unconscionability). The significant financial consideration provided to Plaintiff in and of itself demonstrates that the Separation Agreement is in no way unconscionable; in any event, Plaintiff’s ratification of the Separation Agreement by failing to revoke it and to return the severance payments “renders the Agreement valid and enforceable against [him].” See Pallonetti, 2011 U.S. Dist. LEXIS 14529, at *16; Farrell, 2004 U.S. Dist. LEXIS 2508, at *17-18 (terminated employee could not void release where she accepted two weeks’ severance payment of \$2,115.38).

⁸ Moreover, that Plaintiff was represented by counsel strongly militates against voiding a contract for Plaintiff’s claims of unconscionability and adhesion. See, e.g., Precision Mechanical, Inc. v. Dormitory Auth., 5 A.D.3d 653, 654, 774 N.Y.S.2d 734, 734 (2d Dep’t 2004) (rejecting plaintiff’s argument that an agreement was a contract of adhesion where plaintiff was “represented by counsel who reviewed and helped negotiate its terms”); Aviall, Inc. v. Ryder Sys., 913 F. Supp. 826, 831 (1996). In fact, Plaintiff’s self-proclamation that he has “a superior legal mind” (see Compl. ¶ 72) demonstrates he is “a far cry from the prototypical ‘uneducated’ and ‘needy’ individual for whom the unconscionability doctrine was fashioned.” Nayal, 630 F. Supp. 2d at 573 (citations omitted).

4. Plaintiff's Claim that KBT&F Breached the Separation Agreement is Baseless

In Count Fourteen, Plaintiff alleges that KBT&F breached the Separation Agreement and seeks the extraordinary remedy that he be “excused from further performance” of the Separation Agreement. Plaintiff’s “breach of contract” claim is baseless and should be dismissed.⁹

First, the remedy Plaintiff seeks, excuse from performance, is expressly barred by the clear and unambiguous terms of the Separation Agreement, which limits Plaintiff to “bringing appropriate proceedings to enforce this Agreement.” (Piesco Aff., Exh. B ¶ 8.) In other words, the only relief Plaintiff arguably is permitted to seek is enforcement of the Firm’s obligations to him under the Separation Agreement. Therefore, Count 14 of the Complaint should be dismissed.

Plaintiff’s breach of contract claim otherwise is without merit. With respect to Plaintiff’s allegations that KBT&F breached the Agreement by “terminating Plaintiff’s email, phone, and secretarial services,” the Agreement clearly and unambiguously provides that “to the extent feasible, the Firm shall maintain your email, voice mail and secretarial answering service and website bio for purposes of facilitating a smooth transition for you and the Firm through July 15, 2011.” (Piesco Aff., Exh. B ¶ 1) (emphasis added).

After Plaintiff’s employment was terminated, the Firm learned that Plaintiff had misappropriated approximately 190 electronic documents and files containing confidential and sensitive client information from the Firm’s computer systems. (Piesco Aff. ¶ 8.) Plaintiff, through his counsel, was confronted with his unauthorized removal of these files. (*Id.*) The

⁹ Plaintiff’s claim that “KBT&F withheld significantly more deductions (approximately \$600) than are legally required from the first severance payment it made to Plaintiff” is baseless. KBT&F paid Plaintiff “severance based on [his] final base salary rate, less applicable withholdings and legally required deductions,” as required by the Separation Agreement and applicable law. (Piesco Aff., Exh. B ¶ 2.) (emphasis added).

Firm subsequently was informed by Plaintiff's counsel that his client admitted to removing these files without authorization and that he would immediately return them to the Firm. (Id.)

Plaintiff subsequently delivered a USB thumb drive to the Firm containing the files he improperly removed and provided the Firm with a representation in writing that he did not retain copies of any of these electronic files. (Id.) Based on Plaintiff's wrongful conduct, it was not feasible to provide Plaintiff email access or other Firm services.

Second, KBT&F made the severance payments to Plaintiff in accordance with the Separation Agreement, with the first such payment "commencing on the next payroll date following the Effective Date . . . of this Agreement." (Compl. ¶ 246(c); Piesco Aff., Exh. B ¶ 2.) KBT&F specifically advised Plaintiff, by email dated May 31, 2011, that the "next payroll date following the Effective Date" was June 15, 2011.¹⁰ (Piesco Aff. ¶ 12 & Exh. C.) It is not and cannot be disputed that Plaintiff accepted the severance payments as they were made by KBT&F, thereby waiving his immaterial allegations concerning the timing of the severance payments. See Pallonetti, 2011 U.S. Dist. LEXIS 14529, at *16-17 (accepting severance rendered release valid and enforceable); see also Farrell, 2004 U.S. Dist. LEXIS 2508, at *17-18 (same).

Finally, Plaintiff's bald allegation that KBT&F "did not pay Plaintiff for accrued and unused vacation days" is unfounded. Associates of KBT&F receive four weeks of vacation per year. (Piesco Aff. ¶ 15.) As of May 15, 2011, Plaintiff had accrued seven days. (Id.) According to Plaintiff's own time entry records, he had already used two of these seven vacation days, as well as two personal days which should have been coded as vacation time. (Id.)

¹⁰ Because the Effective Date of the Separation Agreement was May 28, 2011, past the deadline for the May 31, 2011 payroll, June 15, 2011 was the "next payroll date following the Effective Date." (Piesco Aff. ¶ 12 & Exh. C.)

Therefore, Plaintiff had only three accrued and unused vacation days as of the date of his termination. (Id.)

Nevertheless, the Firm paid Plaintiff for five accrued, unused vacation days. (Id. ¶ 16.) Plaintiff was terminated on May 10, 2011, and the Firm paid him his regular pay through May 15, 2011, satisfying any obligation it may have had to “pay out” his accrued time. (Id.)

II. Each of Plaintiff’s Claims Also Fails as a Matter of Law

Even assuming Plaintiff’s claims were not contractually barred by the Separation Agreement – and they clearly are – Plaintiff has not alleged and cannot allege the elements necessary to sustain a single one of his purported claims. As such, for this additional reason, each of Plaintiff’s claims properly should be dismissed as a matter of law.

A. Fraudulent Misrepresentation and Negligent Misrepresentation

In Counts One and Two of the Complaint, Plaintiff purports to bring claims for fraudulent misrepresentation and negligent misrepresentation, respectively. Plaintiff’s misrepresentation claims, however, fail as a matter of law because he does not – and cannot – allege elements essential to both causes of action – an actionable misrepresentation and reasonable reliance upon same to his detriment.

Plaintiff’s allegations that he relied upon certain statements made by KBT&F representatives and “upon information and belief, the KBTF website” two years before he commenced at-will employment as an associate, cannot sustain an action for fraudulent or negligent misrepresentation. The statements that Plaintiff claims in his Complaint he relied upon include: that KBT&F “was an exciting firm that valued creativity and intelligence and ambition and allowed associates to grow as quickly as they could” and that “document review was a burden shared by all, and that junior associates were encouraged to seek out more interesting assignments and make their own way in the firm.” (Compl. ¶ 131(a)-(c).)

Even assuming that these alleged statements were made, each statement is, on its face, at most a statement of opinion. Therefore, they are not actionable. See Thomas v. McLaughlin, 276 A.D.2d 440, 440-41, 715 N.Y.S.2d 388, 389 (1st Dep't 2000) (“[A] representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud.”).

In addition, Plaintiff cannot satisfy the requirement that he reasonably relied to his detriment upon the alleged statements. Indeed, as the First Department has held, an at-will employee’s “reliance on representations on [an employer’s] future intentions, such as job security or future changes, would be deemed unreasonable as a matter of law.” Meyercord v. Curry, 38 A.D.3d 315, 316-17, 832 N.Y.S.2d 29, 31 (1st Dep't 2007) (granting motion to dismiss at-will employee’s causes of action for fraudulent inducement and negligent misrepresentation); accord Arias v. Women in Need, Inc., 274 A.D.2d 353, 354, 712 N.Y.S.2d 103, 103-04 (1st Dep't 2000).

B. Tortious Interference and Conspiracy

In Counts Three and Four, Plaintiff claims that Conroy (who was then a KBT&F associate and is now a partner) tortiously interfered with his “prospective contractual relationship ([Plaintiff’s] at will employment with KBT&F),” and that Marks (also a KBT&F partner) and Conroy purportedly “conspired” to interfere with his at-will employment. (Compl. ¶¶ 151, 163.)

Plaintiff’s claims are not sustainable. First, New York does not recognize such a cause of action in the at-will employment context. See Ingle v. Glamore Motor Sales, 73 N.Y.2d 183, 188-89, 535 N.E.2d 1311, 1313-14, 538 N.Y.S.2d 771 (1989) (“There is no cause of action in tort for abusive or wrongful discharge of an at-will employee,” and a plaintiff may not “evade the employment at-will rule and relationship by recasting his cause of action in the garb of a

tortious interference with his employment.”); accord Thawley v. Turtell, 289 A.D.2d 169, 170, 736 N.Y.S.2d 2 (1st Dep’t 2001).

Because his tortious interference claim fails as a matter of law, Plaintiff’s claim for “conspiracy to interfere” with his at-will employment necessarily fails as well. See Monsanto v. Elec. Data Sys. Corp., 141 A.D.2d 514, 515, 529 N.Y.S.2d 512, 514 (2d Dep’t 1988) (“Insofar as the complaint alleges that the defendants conspired to terminate the employment of the plaintiff, the conspiracy claim is not actionable since New York does not recognize a common-law tort theory of liability based upon wrongful discharge of an ‘at-will’ employee.”) (citations omitted).

C. Breach of Implied Contract

In Count Five, Plaintiff alleges that he was terminated “for calling attention to KBTF’s possibly fraudulent billing practices” and that in so doing KBT&F breached an alleged implied obligation it owed to him. (Compl. ¶¶ 170-76.) These egregiously false allegations do not state a cause of action under New York law.¹¹

As the New York Court of Appeals has held, an employee cannot bring a breach of implied contract claim against his employer where, as here, it is based on a supposed contractual obligation that is inconsistent with the employee’s at-will status – “a relationship in which the law accords the employer an unfettered right to terminate the employment at any time.” Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 304, 448 N.E.2d 86, 91, 461 N.Y.S.2d 232, 237 (1983) (affirming dismissal of terminated at-will employee’s cause of action for breach of implied contract where “plaintiff argues in substance that he was required by the terms of his employment to disclose accounting improprieties and that defendant’s discharge of him for

¹¹ In addition, this claim is duplicative of Plaintiff’s N.Y. Labor Law Section 740 claim (Count Six). See Section II(D), infra.

having done so constituted a failure by the employer to act in good faith”). As Plaintiff’s employment with the Firm indisputably was at will, this claim cannot be sustained.

D. Wrongful Termination in Violation of New York Labor Law Section 740

In Count Six, Plaintiff sets forth vague and general allegations concerning his purported communication of “possibly fraudulent billing practices” to KBT&F in support of his purported claim that he was wrongfully terminated in violation of N.Y. Labor Law Section 740. (Compl. ¶¶ 171-2, 178.) These general and false allegations do not meet Section 740’s requirement that the employer’s complained-of practice present a “substantial and specific danger to public health or safety.” N.Y. Labor Law § 740(2)(a); Remba v. Federation Emp’t and Guidance Svcs., 149 A.D.2d 131, 134, 545 N.Y.S.2d 140, 142 (1st Dep’t 1989), aff’d, 76 N.Y.2d 801, 559 N.E.2d 655, 559 N.Y.S.2d 961 (1990) (“statute’s protection extends only to those violations which create and present a ‘substantial and specific danger to the public health or safety’”).

New York courts routinely dismiss wrongful termination causes of action under Section 740 where the purported claims concern alleged “fraudulent billing” or other financial misdeeds or improprieties. See, e.g., Remba, 149 A.D.2d at 134, 545 N.Y.S.2d at 141 (dismissing Section 740 claim where employee alleged she was terminated for “objection to, and refusal to participate in, [employer’s] alleged fraudulent billing of the City of New York”); Kaganowicz v. Booth Mem’l Med. Ctr., 215 A.D.2d 530, 531, 627 N.Y.S.2d 948 (2d Dep’t 1995) (upholding summary judgment dismissal of Section 740 cause of action, finding that plaintiff failed to demonstrate that the “allegedly unlawful billing practices of the hospital ‘create[d] and present[ed] a substantial and specific danger to the public health or safety’”); Pipia v. Nassau Cty., 34 A.D.3d 664, 666, 826 N.Y.S.2d 318, 319-20 (2d Dep’t 2006) (same); Lamanga v.

N.Y.S. Ass'n for the Help of Retarded Children, 158 A.D.2d 588, 589, 551 N.Y.S.2d 556, 557 (2d Dep't 1990) (same).¹²

E. Intentional Infliction of Emotional Distress

In Count Seven, Plaintiff purports to state a cause of action for intentional infliction of emotional distress, on the grounds that the following alleged conduct was “extreme and outrageous”: that Conroy complained to Marks about an email Plaintiff sent, causing Plaintiff to be reprimanded in front of a witness to whom Plaintiff was not introduced; that KBT&F terminated Plaintiff’s employment during a performance review; that the Firm, after terminating Mr. Berry’s employment, terminated his access to Firm email, phone and secretarial service; that the Firm did not timely pay Mr. Berry his severance and withheld \$600 more from the payment than was “required or expected.” (Compl. ¶ 184(a)-(h).)

To state a claim for intentional infliction of emotional distress under New York law, a plaintiff must allege conduct that is “so outrageous in character and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.” Murphy, 58 N.Y.2d at 303, 448 N.E.2d at 90, 461 N.Y.S.2d at 236 (affirming dismissal of intentional infliction with emotional distress cause of action where plaintiff alleged his termination was “deliberately and viciously insulting, was designed to and did embarrass and humiliate plaintiff” after plaintiff disclosed to management alleged accounting improprieties); Curto v. Med. World Commc’ns, Inc., 388 F. Supp. 2d 101, 112 (E.D.N.Y. 2005) (“The rare instances where the New York courts have found the complaint sufficient to state an [intentional infliction of emotional distress] claim in the employment context generally involve allegations of more significant battery, or improper physical contact”).

¹² Moreover, as set forth in Section III, infra, by purporting to assert a claim for wrongful termination in violation of Section 740, each of Plaintiff’s thirteen other causes of action is irrevocably barred.

Plaintiff's allegations do not come close to meeting this standard, and therefore, Count Seven should be dismissed.

F. Tortious Interference with Prospective Employment Advantage

In Count Eight, Plaintiff alleges that KBT&F tortiously interfered with his prospective employment advantage by representing to him that the Firm would communicate to inquiring prospective employers only the dates of his employment and the position he held at KBT&F. (Compl. ¶¶ 188-94.) This incoherent claim likewise should be dismissed.

Not only did Plaintiff expressly agree in Paragraph 14 of the Separation Agreement to this protocol for providing employment information to Plaintiff's prospective employers (Piesco Aff., Exh. B ¶ 14), he does not – and cannot – allege that KBT&F's provision of such routine employment information is the cause of any alleged “injury.” Moreover, he has not alleged any “specific job opportunities for which he has applied” with which KBT&F allegedly interfered, let alone that any such “interference” was accomplished by “wrongful means” or that KBT&F “acted for the sole purpose of harming [him].” See Snyder v. Sony Music Entm't., Inc., 252 A.D.2d 294, 299-300, 684 N.Y.S.2d 235, 239 (1st Dep't 1999) (dismissing terminated employee's cause of action for tortious interference with prospective economic advantage); see NBT Bancorp Inc. v. Fleet/Norstar Fin. Group, Inc., 87 N.Y.2d 614, 624, 641 N.Y.S.2d 581, 586 (1996) (“wrongful means” required for a claim of tortious interference with prospective economic advantage are “physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract”) (citation omitted).

G. Injurious Falsehood

In Count Nine, Plaintiff purports to state a claim for injurious falsehood, alleging that KBT&F stated a “falsehood” in the Separation Agreement by representing that the Firm has a

“‘policy’ of only providing dates and position to employment inquiries.” (Compl. ¶¶ 198-99.)

Such allegations fail to support a claim for injurious falsehood.

To state a claim for injurious falsehood, a plaintiff must allege the defendant knowingly published a (1) “false matter derogatory to the plaintiff’s business of the kind calculated to prevent others from dealing with the business or otherwise interfering with its relations with others, to its detriment,” (2) “[t]he communication must play a material and substantial part in inducing others not to deal with the plaintiff,” (3) “with the result that special damages, in the form of lost dealings, are incurred,” and “actual losses must be identified and causally related to the alleged tortious act.” Waste Distillation Tech., Inc. v. Blasland & Bouck Eng’rs, P.C., 136 A.D.2d 633, 634, 523 N.Y.S.2d 875, 877 (2d Dep’t 1988); see also Ruder & Finn Inc. v. Seaboard Surety Co., 52 N.Y.2d 663, 670, 422 N.E.2d 518, 522, 439 N.Y.S.2d 858, 862 (1981); Henneberry v. Sumitomo Corp., 415 F. Supp. 2d 423, 470 & n.24 (S.D.N.Y. 2006).

Plaintiff does not and cannot allege any of these elements. For example, he does not and cannot allege that KBT&F knowingly “published” a false statement “denigrating the quality of [Plaintiff’s] business’ . . . services” to anyone. See Ruder & Finn, 52 N.Y.2d at 670-71, 422 N.E.2d at 522, 439 N.Y.S.2d at 862. Since the only statement alleged is contained in a confidential Separation Agreement between Plaintiff and KBT&F, the statement clearly was not “published” to any third party at all. See id. at 670, 439 N.Y.S.2d at 862 (noting requirement that falsehood be “published to third parties”). As there are also no special damages or actual losses, it is clear that this claim fails.

H. Prima Facie Tort

In Count Ten, Plaintiff purports to state a claim for *prima facie* tort. To state a cause of action for *prima facie* tort, a plaintiff must plead “(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts

which would otherwise be lawful.” Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142-43, 480 N.E.2d 349, 354-55, 490 N.Y.S.2d 735 (1985) (affirming dismissal of *prima facie* tort cause of action). A “critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages. Id. at 142-43, 480 N.E.2d at 355, 490 N.Y.S.2d 735. Indeed, “[a] *prima facie* tort cause of action cannot be allowed in circumvention of the unavailability of a tort claim for wrongful discharge or the contract rule against liability for discharge of an at-will employee.” Monsanto, 141 A.D.2d at 517, 529 N.Y.S.2d at 515 (citation omitted).

Plaintiff’s *prima facie* tort claim is based on nothing more than an allegation that KBT&F does not actually have a policy whereby it only provides a former employee’s dates of employment and position to prospective employers. (Compl. ¶¶ 206-07.) Even assuming KBT&F did not have such a policy, Plaintiff does not allege that KBT&F intentionally inflicted any harm upon him, and clearly fails to allege any “specific and measurable loss.” See Freihofer, 65 N.Y.2d at 142-43, 480 N.E.2d at 354-55, 490 N.Y.S.2d 735; Monsanto, 141 A.D.2d at 517, 529 N.Y.S.2d at 515 (affirming dismissal of at-will employee’s *prima facie* tort cause of action against employer).

III. New York Labor Law Section 740’s Exclusive Remedy Provision Bars Plaintiff’s Other Causes of Action

Not only are all of Mr. Berry’s claims barred by the Separation Agreement and separately inadequately pled, but they are further barred based on irrevocable waiver under Labor Law Section 740. Under New York law, an effort to plead a claim under Section 740 irrevocably waives all other causes of action that arguably relate to a plaintiff’s employment. N.Y. Labor Law § 740(7) (“the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining

agreement, law, rule or regulation or under the common law”); accord Reddington v. Staten Isl. Univ. Hosp., 11 N.Y.3d 80, 87, 893 N.E.2d 120, 862 N.Y.S.2d 842 (2008) (“The plain text of [§ 740(7)] indicates that ‘institut[ing]’ an action – without anything more – triggers waiver”); Maccagno v. Prior, 78 A.D.3d 549, 549-50, 910 N.Y.S.2d 646, 647 (1st Dep’t 2010) (affirming trial court’s decision holding that pro se plaintiff “inadequately pleaded a cause of action under [N.Y. Labor Law § 740], but in doing so, elected a remedy that effectively waived any other rights and remedies it had”). Therefore, each of Plaintiff’s other causes of action are barred as a matter of law.

CONCLUSION

For the foregoing reasons, Plaintiff’s Complaint should be dismissed with prejudice in its entirety.

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Respectfully submitted,

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