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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CESAR BAEZ, Plaintiff and Appellant, v. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM et al., Defendants and Respondents.	B280841 (Los Angeles County Super. Ct. No. BC498010)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed.

Meylan Davitt Jain Arevian & Kim and Robert Meylan; Schlam Stone & Dolan, Jeffrey M. Eilender, Jonathan Mazer, and Samuel Butt for Plaintiff and Appellant.

Reed Smith, Raymond A. Cardozo and Brian A. Sutherland for Defendants and Respondents.

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A public agency caught up in a scandal for awarding investment management contracts to persons recommended by influence peddlers (a so-called "pay to play" scandal) told one of its investment managers that it would award the manager new business only if it disassociated itself from one of its principals, whom the agency had reason to believe had close relationships with several individuals involved in the pay to play schemes. To remain eligible for that new business, the manager modified its profit sharing agreements to reduce the affected principal's involvement (and associated return) and did so by having its principals "voluntarily" sign an amendment to those agreements. The ousted principal later sued the agency and its key decision maker for racial discrimination, for interfering with the manager's original profit sharing agreements, and for interfering with a prospective economic advantage. The trial court granted summary judgment for the public agency, and the principal appeals. We conclude there was no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Undisputed Facts

A. *Formation of the Centinela entities*

Plaintiff Cesar Baez (plaintiff), Fidel Vargas (Vargas), and Robert Taylor (Taylor) are investment advisors. Plaintiff and Vargas are Latino; Taylor is African-American. In the mid-2000's, they formed a number of LLCs, each of which have Centinela in their name (the Centinela entities).[1] Through the Centinela entities, plaintiff and his partners sought investment contracts from public agencies as "emerging"—that is, minority-

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1 At certain points in time, there was a fourth owner, but the various fourth owners are not germane to the issues in this appeal.

owned—investment managers. Two of the LLC's agreements spelled out how the three principals would divide up the profits earned by the various Centinela entities (the profit sharing agreements).

B. *Link I and Link II Contracts*

Defendant California Public Employees' Retirement System (CalPERS) is a public agency that, among other things, is responsible for managing the pension contributions of California state employees.

In 2007, CalPERS awarded the Centinela entities a contract to manage $500 million of CalPERS's investment funds. CalPERS and the Centinela entities formed a new LLC—Capital Link Fund I, LLC—to manage this fund. CalPERS retained the right to terminate the contract for any reason as long as it gave 90 days' notice.

In 2008, CalPERS awarded the Centinela entities a second $500 million investment contract. The parties formed Capital Link Fund II, LLC to manage this fund. Like its predecessor, this contract also had a no-fault termination provision.

C. *Pay to Play Scandal*

In 2009, CalPERS's then-chief executive officer was found to be pushing CalPERS staff to award investment manager contracts to entities recommended by influence peddlers (who were more innocuously called "placement agents"). This pay to play scandal was widely publicized and "badly damaged" CalPERS's reputation, which consequently placed its process for awarding investment management contracts under greater scrutiny and elevated the reputation of its investment managers to a "heightened consideration."

D. *Link III Contract*

In 2009 or 2010, CalPERS was seeking an investment manager for a $100 million fund (the Link III fund), and was considering the Centinela entities to be its manager.

In 2010, CalPERS's chief investment officer, defendant Joseph Dear (Dear), hired an outside investigator called Pension Consulting Alliance, Inc. (PCA) to conduct due diligence on the Centinela entities; CalPERS had hired PCA to conduct due diligence on Centinela for the Link I and Link II contracts as well.

From its investigation, PCA identified two concerns about plaintiff: (1) plaintiff had involuntarily left two of his prior investment jobs at the State of New Jersey Division of Investments and at a private investment firm called Hicks, Muse, Tate, and Furst; and (2) plaintiff had "professional and personal affiliations" with several individuals who had been charged or convicted of being "influence peddlers" in one or more pay to play schemes. With respect to the second concern, PCA had not uncovered any "wrongdoing" by plaintiff and could not "determine[]" "[t]he extent and depth" of plaintiff's affiliations, but nevertheless felt that plaintiff's relationships with multiple influence peddlers "may be perceived as a reputational concern" and thus reflect . . . negatively on CalPERS."

PCA invited plaintiff to comment on both concerns. Plaintiff responded that his departures from his prior jobs had been voluntary and that his contact with the five influence peddlers had been "limited." PCA also hired a second outside firm to investigate further. This firm reported that "a former senior official" at the New Jersey Division of Investments said plaintiff had departed on his own and that plaintiff had left the

private investment firm "after the Latin American fund was hit hard by the perceived economic troubles in South America."

At a subsequent February 14, 2011 meeting between Dear, the lead investigator at PCA, and the three Centinela principals, Dear took the "hard position" that CalPERS would not consider awarding the Link III contract to the Centinela entities as long as plaintiff was a principal. Dear explained that a "fitness and judgment issue" necessitated the need to change the Centinela entities' leadership.

Later that month, the Centinela entities' principals presented CalPERS with a "failsafe proposal," under which plaintiff would remain with the Centinela entities unless and until he was investigated or indicted with a crime. Dear rejected the proposal.

In August 2011, plaintiff, Vargas and Taylor signed a written Separation Agreement. The agreement removed plaintiff as an active managing partner of the Centinela entities and reduced his entitlement to share in the entities' profits. As part of the agreement, each of the three partners recited that he was "knowingly and voluntarily enter[ing] into th[e] . . . agreement."

In October 2011, CalPERS awarded the Link III contract to a different investment manager.

II. Procedural Background

A. *Operative Pleadings*

Plaintiff sued CalPERS and Dear. After we overturned the trial court's order sustaining a demurrer to all of plaintiff's claims, plaintiff filed the operative second amended complaint. In that complaint, plaintiff sued CalPERS and Dear[2] for:

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2 Although Dear passed away during the pendency of plaintiff's first appeal, the second amended complaint named him

(1) violating equal protection, by discriminating against him on the basis of his Latino heritage; (2) declaratory relief that his equal protection rights were violated; (3) intentional interference with the profit sharing agreements between the Centinela entities' principals; (4) intentional interference with a prospective economic advantage; and (5) negligent interference with a prospective economic advantage. Plaintiff sought a declaratory judgment, an injunction requiring CalPERS to award the Link III contract to the Centinela entities, at least $30 million in compensatory damages, and punitive damages. CalPERS and Dear (collectively, defendants) answered, raising 15 affirmative defenses.

B. *Summary Adjudication and Judgment Motions*

Plaintiff moved for summary adjudication of eight of defendants' affirmative defenses. Defendants moved for summary judgment on all of plaintiff's claims. The parties filed extensive briefing. In responding to the motion for summary judgment, plaintiff presented evidence that (1) PCA's concerns about plaintiff's involuntary departure from two of his prior jobs and his associations with influence peddlers were factually incorrect, and (2) Dear once made a statement "to the effect that 'if your name ends in "ez" then good luck trying to do business with CalPERS.'"

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as a defendant on all claims. CalPERS's attorneys continued to represent Dear in their pleadings, and the trial court's summary judgment ruling and subsequent judgment included Dear as a defendant. In this appeal, no one submitted a brief on Dear's behalf, but our opinion applies equally to any interest his representative maintains.

C. *Trial Court Ruling*

The trial court granted summary judgment to defendants.

As to plaintiff's equal protection and declaratory relief claims, the court ruled that the pertinent question, which it borrowed from the law of employment discrimination, was whether racial discrimination was a "substantial motivating reason" for asking plaintiff to disassociate himself from the Centinela entities. The court concluded that CalPERS established its prima facie case that it had insisted upon plaintiff's ouster for a "legitimate reason that had nothing to do with his Latino ancestry"—namely, "his association with individuals under investigation for 'pay to play' misconduct." Three pieces of evidence supported this prima facie case: (1) CalPERS was relying upon PCA's investigation and recommendation, which was based on those reputational concerns; (2) CalPERS did not insist that Vargas leave Centinela, despite Vargas being Latino; and (3) CalPERS had preconditioned further business with another investment manager upon the ouster of one of its principals, who had been implicated in a pay to play scandal and who was a white male.

The trial court further concluded that plaintiff had not rebutted defendants' prima facie showing by "rais[ing] a triable issue that his Latino ancestry was a substantial motivating factor." Specifically, the court rejected plaintiff's arguments that: (1) the PCA investigation was flawed and potentially inaccurate, because even if true, it would "not reflect on [d]efendants because PCA was an independent firm and there is no evidence that anyone from CalPERS participated in or influenced PCA's investigation"; (2) the white principal's ouster from his investment firm due to his "greater involvement" in the scandal

than plaintiff was irrelevant because this fact did "not change the fact that CalPERS's actions were related to the investigation" and not anti-Latino bias; (3) CalPERS's subsequent termination of the Link I and II contracts in October 2012, was evidence of anti-Latino bias (given that it effectively ousted Vargas), because there was "no evidence that the breakup was motivated by discriminatory intent"; and (4) Dear was biased against Latinos, as evidenced by a statement attributed to Dear through three levels of hearsay, that no one with a last name "ending in 'ez'" will be getting any work from CalPERS, because the statement was inadmissible hearsay.

As to plaintiff's remaining interference with contract and interference with prospective economic advantage claims, the court ruled that plaintiff had failed to adduce a triable issue of material fact on two elements central to all of those claims. First, the court ruled that plaintiff had not adduced any triable issue of fact as to whether Centinela "interfered" with any contract or future opportunities because (1) plaintiff voluntarily withdrew from the Centinela entities in response to CalPERS's concerns, and (2) CalPERS's insistence upon plaintiff's disassociation was an exercise of its "lawful right to choose the investment firms and managers with which it conducts business," and the "threat of taking a lawful action is not economic duress." Second, the court ruled that plaintiff had not adduced a triable issue of fact as to whether any interference was "unjustified or wrongful" because, as explained in the court's equal protection analysis, there was no admissible evidence that CalPERS acted with an anti-Latino bias.

The court dismissed plaintiff's motion for summary adjudication as moot.

D. *Judgment and Appeal*

After the trial court entered judgment, plaintiff filed this timely appeal.

DISCUSSION

Plaintiff challenges the trial court's grant of summary judgment. Summary judgment is appropriate, and the moving party (typically, the defendant) is entitled to judgment as a matter of law, where (1) the defendant carries its initial burden of showing either the nonexistence of one or more elements of the plaintiff's claim or the existence of an affirmative defense, and (2) the plaintiff thereafter fails to show the "existence of a triable issue of material fact" as to those elements or affirmative defenses. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, 853; *Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 830; *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 858; Code Civ. Proc., § 437c, subds. (a)(1), (c), (*o*)(1), (*o*)(2), (p).)[3] In evaluating whether these standards for granting summary judgment have been satisfied, a court must "strictly construe[]" the affidavits of the moving party, "liberally construe[]" those of the opposing party, and resolve any doubts against summary judgment. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 874.) However, a trial court may only consider "admissible evidence" and inferences "'reasonably deducible from [that] evidence.'" (§ 437c, subd. (d); *Miller*, at p. 874; *Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh* (2016) 6 Cal.App.5th 443, 459.) "Speculation . . . is not evidence" (*Aguilar*, at p. 864), and will not create a triable issue of material fact.

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3 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

We independently review a trial court's grant of summary judgment. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.) We consequently review "only the result, not the trial court's reasoning." (*Conway v. County of Tuolumne* (2014) 231 Cal.App.4th 1005, 1020, fn. 5.) To sidestep the current split in authority over the standard of review for evidentiary rulings made in the course of a summary judgment ruling (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535), we will independently review any pertinent evidentiary rulings.

I. Equal Protection-Related Claims

To establish a claim for a violation of equal protection premised on being singled out as a "class of one," a plaintiff must establish that: (1) he "'was treated differently from other similarly situated persons'"; (2) "'the difference in treatment was intentional'"; and (3) "'there was no rational basis for the difference in treatment'" other than the alleged illegitimate basis. (*Gerawan Farming, Inc. v. Agricultural Labor Relations Bd.* (2017) 3 Cal.5th 1118, 1143-1144; *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 605 (*Genesis*); see *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564 [defining equal protection claim for a "class of one"].) The first element requires proof of "'a disparity in treatment'" between persons with an "'extremely high'" "'level of similarity.'" (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 594 (*Squires*).) The third element requires proof that "the difference in treatment was "'so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.'"" (*Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 859 (*Las Lomas*),

quoting *Gregory v. Ashcroft* (1991) 501 U.S. 452, 471.) "'[I]f it is plausible that there were legitimate reasons for the'" differential treatment, this element is lacking as a matter of law. (*Squires*, at p. 595.) A reason can be legitimate even if it is unwise (*Las Lomas*, at pp. 858-859) or unfair (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313 (*Beach*)). Proving this element is "exceedingly difficult," and nearly "insurmountable" when it comes to a public entity's discretionary decisions. (*Las Lomas*, at p. 859; *Squires*, at p. 595.)

A. *Differential Treatment from Similarly Situated Persons*

Defendants have carried their initial burden of establishing that plaintiff was not "treated differently from other similarly situated persons." (*Genesis*, *supra*, 113 Cal.App.4th at p. 605.) That is because plaintiff has not identified anyone else with an "extremely high" "level of similarity" to him—that is, whom CalPERS believed to have "personal and professional affiliations" with charged and convicted influence peddlers and who was *not* asked to leave the management of a CalPERS contractor as a condition of CalPERS's continued business with that contractor. The only evidence regarding a specific individual was Christopher Bower, but Bower was a white man who *was* asked to disassociate from Pacific Corporate Group as a condition of CalPERS's continued business with Pacific Corporate Group and its successors.

Plaintiff has not rebutted this prima facie showing by raising any triable issues of material fact. Beyond broad generalities that the universe of CalPERS's investment managers is a small and incestuous one and testimony that CalPERS's request that a principal disassociate himself a management firm was "unique" but not "extraordinary," plaintiff did not produce

any evidence that CalPERS allowed any of its investment managers' principals who had associations with influence peddlers "extremely" "similar" to plaintiff's to remain. Plaintiff asserts that Bower's involvement in the pay to play scandals was more egregious and better substantiated than his, but the fact that someone differently situated from plaintiff was subjected to the same treatment as plaintiff is not proof that people highly similar to him were treated differently.

B. *Rational Basis for Difference in Treatment*

1. *Prima facie case*

Defendants have also carried their initial burden of establishing that it is "plausible" that they had "legitimate reasons" to ask plaintiff to step away from the Centinela entities—namely, because PCA had reported plaintiff's "personal and professional affiliations" with multiple influence peddlers at a time when CalPERS, the entity entrusted with securing the pensions of state employees, was emerging from a scandal involving the award of contracts through influence peddlers. Avoiding the appearance of impropriety, even where there is no actual impropriety, is undeniably a legitimate interest. (See *San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2017) 16 Cal.App.5th 1273, 1279, review granted Jan. 24, 2018, S245996; *Thomson v. Call* (1985) 38 Cal.3d 633, 648; *Housing Authority of Monterey County v. Jones* (2005) 130 Cal.App.4th 1029, 1031; *People v. Goldstein* (1982) 130 Cal.App.3d 1024, 1031.)

2. *Triable issues of fact*

Plaintiff has not rebutted this prima facie case by raising any triable issue of material fact. As a threshold matter, CalPERS's decision whether to award future investment

contracts—and, more to the point, the conditions upon which it will do so—is the discretionary decision of a public agency; a plaintiff's burden in demonstrating that an agency's exercise of such discretion was not legitimate is, as noted above, "exceedingly difficult," if not "insurmountable." (*Las Lomas*, *supra*, 177 Cal.App.4th at p. 859; *Squires*, *supra*, 231 Cal.App.4th at p. 595.)

Plaintiff offers three categories of arguments in an effort to surmount that hurdle.

a. Anti-Latino bias

Plaintiff points to evidence that, in his view, creates a triable issue of fact as to whether CalPERS or Dear singled him out for differential treatment because he is Latino. He points to four items of evidence.

First, he cites Dear's alleged statement "to the effect that 'if your name ends in "ez" then good luck trying to do business with CalPERS.'" However, plaintiff's evidence of this statement is "triple hearsay": Dear said it to Real Desrochers, a "high level executive" at CalPERS; Desrochers repeated it to Marcos Rodriguez, a friend of plaintiff's who was at the time trying to get a CalPERS contract; and Rodriguez repeated it to plaintiff. Triple hearsay is admissible only if there is a hearsay exception for each level. (Evid. Code, § 1201; *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1304.) Even if we assume that Dear's statement qualifies as the statement of a party opponent (Evid. Code, § 1220), and that Desrochers's statement qualifies as an authorized admission (Evid. Code, § 1222), Rodriguez's statement is hearsay and does not fall into any exception. Plaintiff argues that passing along Desrochers's statement about Dear was against Rodriguez's pecuniary interest

because it could have cost Rodriguez a future CalPERS contract, but the hearsay exception for such declarations against interest requires that the declarant be unavailable (Evid. Code, § 1230), and no evidence establishes that foundational fact, including the foundational fact that plaintiff was reasonably diligent in trying to obtain Rodriguez's declaration (Evid. Code, § 240, subd. (a)(5)). Plaintiff also argues that Dear's statement was not hearsay at all because what mattered was that Dear made the statement, not whether Dear believed it. However, the only way Dear's statement comes in even for this limited purpose is if Desrochers and Rodriguez were telling the truth in relaying it to plaintiff, which requires each of their statements to fit within a hearsay exception. We therefore reject plaintiff's attack on the trial court's exclusion of this evidence.[4] Because this statement is not admissible, it cannot create a triable issue of fact. (§ 437c, subd. (d).)

Second, plaintiff cites Taylor's declaration that CalPERS executive Desrochers was a racist. Taylor frankly admitted that he never saw Desrochers say or do anything racist, but indicated that Desrochers was "rude" and "dismissive" to him and that he attributed this "hostility" to racism because he could think of "no other explanations" for his behavior. Even if we assume that being "rude" and "dismissive" to African-Americans is proof of anti-Latino bias and that Taylor's basis for believing Desrochers's behavior was racially motivated is not too speculative, it is

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4 We reject plaintiff's attacks on the trial court's other evidentiary rulings because his cursory attacks on these rulings without citation to the record or any legal discussion constitutes a waiver. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1029; *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 685.)

undisputed that Desrochers did not become involved in the decision regarding the Centinela entities until *after* Dear, on the basis of the PCA report, had already insisted upon plaintiff's departure. Plaintiff goes on to argue that Dear's subsequent decision to bring Desrochers onto his team means that Dear was also a racist, but plaintiff has not adduced any evidence that Dear was aware of Desrochers's alleged racism. What is more, plaintiff's proffered "transitive property of racism" theory (A must be racist if A hires B, who is racist) is wholly speculative and thus cannot create a triable issue of fact.

Third, plaintiff cites to his own deposition testimony that he was "certain" that Dear had an "animus against Latinos." A witness's statements about another person's unspoken thoughts is, by definition, speculative. (*Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 [testimony "regarding the state of mind of another person" is inadmissible "speculation"]; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1470 [same].)

Fourth, plaintiff cites CalPERS's decision, in October 2012, to exercise its right to terminate the Link I and Link II investment contracts, and to give the contracts to Credit Suisse, a non-minority investment firm. Plaintiff argues that the termination constitutes so-called "me too" evidence admissible to prove that CalPERS was systematically getting rid of Latinos—first, plaintiff (in 2011) and later, Vargas (through the termination). (E.g., *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [evidence of other incidents tending to show a "gender" or race "bias" admissible to show bias on incident at issue].) Plaintiff's argument might be persuasive if there were any evidence that the 2012 termination was racially motivated (as opposed to based on some other business concern). But plaintiff

introduced no such evidence. The sole evidence he cites is the fact of the termination. That Vargas, a Latino, was still a principal of the Centinela entities at that time does not by itself create a triable issue that the reason for the termination was *because* he was Latino. (See *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005 [adverse action against a member of a protected class does not, by itself, raise a triable issue of fact regarding discriminatory animus].) Plaintiff alternatively suggests that CalPERS's took a two-step approach to firing Centinela to better conceal its racist agenda, but cites no evidence to support this suggestion. It is wholly speculative and raises no triable issue of fact. (See *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 868 [timing and fact of an adverse employment action, without more, does not create a triable issue of fact sufficient to overcome summary judgment].)

b. Correctness and thoroughness of PCA's investigation

Plaintiff next contends that (1) PCA's report to defendants that plaintiff left two prior jobs involuntarily and had affiliations with several convicted influence peddlers was factually incorrect because the people PCA used as references submitted declarations in this litigation disputing what PCA reported they said, (2) PCA should have done more to verify the information provided by the references, and (3) PCA's initial draft report did not include information about plaintiff's purportedly inappropriate affiliations, thereby raising the possibility that PCA was inventing facts to justify plaintiff's ouster.

We reject these arguments. The first argument ignores that what matters in assessing CalPERS's and Dear's reasons for insisting upon plaintiff's ouster is *why CalPERS and Dear acted—and thus, what CalPERS and Dear knew—in 2011*.

Because there is no evidence that CalPERS or Dear knew that the references' statements were anything other than what PCA reported them to be, the references' current declarations do not create a triable issue of material fact as to Dear's motive at the time Dear insisted upon plaintiff's departure in 2011. For the same reasons, the thoroughness of PCA's investigation creates no triable issue of fact. The final argument is based on the supposition that PCA's reports were evolving as it made up new facts to cover its true, anti-Latino motive, but this speculative supposition is squarely refuted by the undisputed fact that PCA told Dear about plaintiff's affiliations and departures from prior firms several weeks *before* its initial report; in other words, the undisputed evidence shows that PCA's concerns about plaintiff were there all along.[5]

c. Lack of any wrongdoing

Plaintiff lastly points to PCA's finding that he never engaged in any "wrongdoing." Without any wrongdoing, plaintiff reasons, CalPERS and Dear had no reason to oust him other than his Latino origin. We reject this reasoning for two reasons. First, whether plaintiff committed any wrongdoing is not relevant: CalPERS was not worried about plaintiff's *wrongdoing*; instead, it was worried about plaintiff's affiliation with multiple influence peddlers, how that affiliation might reflect upon plaintiff's (and Centinela's) reputation, and how that affiliation might consequently reflect upon CalPERS's policies in awarding investment contracts in the wake of a scandal involving the use of

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5 Because no evidence indicates any anti-Latino bias by PCA, we have no occasion to reach plaintiff's argument that PCA's anti-Latino bias should be imputed to CalPERS under theories of agency or fiduciary duty.

influence peddlers to award such contracts. As explained above, the desire to avoid the appearance of impropriety is a legitimate reason. Second, plaintiff's final point seems to rest upon the assumption that CalPERS could only refuse to do business with Centinela in the future if its principals *had* engaged in "wrongdoing." But this assumption is faulty: It is refuted by the undisputed fact that CalPERS had the discretion to award contracts as long as it did do so on a constitutionally permissible basis. Here, there is no triable issue of fact that defendants' discretion was exercised on an impermissible basis. Plaintiff may well be justified in feeling that CalPERS's concern with how plaintiff's affiliations might be perceived—even if those affiliations did not entail any wrongdoing—is unfair to him. But the unfair consequence of CalPERS's reason does not raise any triable issue of fact regarding the legitimacy of that reason. (Accord, *Beach*, *supra*, 508 U.S. at p. 313.)

The trial court properly granted summary judgment on plaintiff's equal protection claims.[6]

II. Intentional Interference With Contractual Relations

To establish a claim for intentional interference with a contractual relation, a plaintiff must establish that (1) "'a valid contract [exists] between plaintiff and a third party,'" (2) defendant knew "'of this contract,'" (3) defendant engaged in "'intentional acts designed to induce a breach or disruption of the contractual relationship,'" (4) there was an "'actual breach or disruption of the contractual relationship,'" and (5) there was

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6 In light of this conclusion, we need not decide whether plaintiff's $30 million compensatory damages prayer is appropriate under the law of equal protection and declaratory judgments.

"'resulting damage.'" (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55.) Implicit in the third and fourth elements is the requirement that the plaintiff prove that defendant's intentional act *caused* the breach or disruption of a contract. (*Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 507; *Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 997-998.) However, the plaintiff does not generally have to prove that the defendant's intentional act is "wrongful apart from the interference with the contract itself" (that is, the act need not be "independently wrongful"). (*Quelimane Co.*, at p. 55; cf. *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1151-1152 [plaintiff must show that a defendant's interference with an at-will employment contract was independently wrongful]; see also *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1004-1005 (*Redfearn*) [declining to apply *Reeves* to disruption of a broker contract].) Even if the plaintiff establishes all of the elements of this tort, a defendant is still not liable if it can establish, as an affirmative defense, that its interference was justified. (*Quelimane Co.*, at p. 42; *Herron v. State Farm Mutual Ins. Co.* (1961) 56 Cal.2d 202, 206-207 (*Herron*); *Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73, 80-81 (*Richardson*).)

A. *Causation*

Defendants have carried their initial burden of establishing that they did not cause the disruption of the Centinela entities' profit sharing agreements and that the Separation Agreement was instead the product of plaintiff's voluntary decision to separate from those entities to give them a better shot at obtaining the Link III contract. To be sure, and as we noted in the prior appeal, the recitation of voluntariness in the Separation

Agreement is not by itself dispositive on the issue of causation. But it puts the onus on plaintiff to demonstrate that his seemingly voluntary consent was, in actuality, the product of duress due to defendants' intentional acts; without such proof, the Separation Agreement was not caused by anything defendants did. (See Civ. Code, § 1567 ["An apparent consent is not real or free when obtained through . . . [d]uress"]; *Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443, 450.)

Plaintiff has not raised a triable issue of fact on the issue of whether he signed the Separation Agreement under duress. In addition to the types of duress defined by statute (Civ. Code, § 1569), courts have recognized that seemingly voluntary consent may be vitiated by "economic duress." (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158 (*Rich*).) Because the free market contemplates "[h]ard bargaining, 'efficient' breaches and reasonable settlements of good faith disputes" (*id.* at p. 1159), it is not enough for a plaintiff to show that his consent was the product of a calculated "business decision" (*River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425) or "financial necessity" (see *Dotson v. Amgen, Inc.* (2010) 181 Cal.App.4th 975, 981-982 [so noting, in the context of procedural unconscionability due to economic duress]). Instead, "economic duress" requires a showing that (1) the defendant engaged in a "wrongful act," and (2) "a reasonably prudent person subject to such an act" had "no reasonable alternative but to succumb" by consenting. (*Rich*, at pp. 1158-1159; *CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 645 (*CrossTalk*); *Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1173-1174; *U.S. Hertz, Inc. v. Niobrara Farms* (1974) 41 Cal.App.3d 68, 81.)

Defendants' act in threatening not to consider the Centinela entities for the Link III contract unless plaintiff withdrew is not a wrongful act because CalPERS had the discretion to decide who would get the award of those funds and because "the taking of legal action or the threat to take such action" does not constitute a wrongful act (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 204; *Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 805). If "'[i]t is not duress or unlawful for a party to threaten to refuse to proceed under a contract nor to threaten to stand suit'" (*London Homes, Inc. v. Korn* (1965) 234 Cal.App.2d 233, 240), it is certainly not duress or unlawful for a party to threaten to exercise its discretion not to enter into a contract in the first place.

Plaintiff makes three further arguments.

First, he contends that defendants' acts *were* wrongful because they were motivated by racial animus. As we have discussed above, plaintiff has not raised a triable issue of fact on the issue of racial animus.

Second, plaintiff argues that it is undisputed that he only signed the Separation Agreement because CalPERS effectively required him to do so before it would consider the Centinela entities for the Link III contract; in the vernacular of the case law, plaintiff says, he was left with "no reasonable alternative but to succumb." Even if we accept that plaintiff has raised a triable issue of fact regarding economic duress's *second* element, he has yet to do so for the doctrine's *first* element—namely, that CalPERS's requirement was "wrongful." Plaintiff cites *Hannigan v. Sears, Roebuck and Co.* (7th Cir. 1969) 410 F.2d 285, 290-291 for the proposition that coercing a person to modify a contract constitutes duress. *Hannigan* did not apply California law,

which in this context requires a "wrongful act"; it accordingly does not aid plaintiff.[7]

Third, plaintiff asserts that defendants' conduct was wrongful because: (1) "wrongful acts" include "[t]he assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment" (*Rich*, *supra*, 157 Cal.App.3d at p. 1159; *CrossTalk*, *supra*, 65 Cal.App.4th at p. 645); and (2) defendants refused to agree to his "failsafe" counterproposal. These assertions do not raise any triable issues of fact. Although "wrongful acts" include a "bad faith threat to breach a contract or to withhold a payment," these acts are wrongful when they pertain to an *existing* contract, and defendants engaged in neither of those acts with regard to an *existing* contract. Instead, defendants insisted upon plaintiff's withdrawal from the Centinela entities as a condition for considering the Centinela entities for a *future* contract. At oral argument, plaintiff asserted that CalPERS had also threatened to terminate the existing Link I and Link II contracts if plaintiff did not withdraw, but it is too late to assert this new theory, which appeared nowhere in plaintiff's operative complaint or in the record underlying the summary judgment motion. Defendants' rejection of the "failsafe" counterproposal was also not wrongful. The implicit assumption of plaintiff's argument is that defendants' refusal to accept the "least restrictive means" of achieving its goal of avoiding reputational harm means that the refusal is wrongful;

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7 Although we cited *Hannigan* in our prior opinion, we did so for the proposition that plaintiff's claim survived demurrer as pled. We did not purport to examine the doctrine of economic duress. (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 ["'It is axiomatic that cases are not authority for propositions not considered'"].)

no law supports this assumption. Further, CalPERS was well within its rights to determine that disassociating plaintiff from the Centinela entities only *after* he was indicted or convicted would come too late to avoid the tarnishing of CalPERS's already tarnished reputation.

B. *Justification*

Defendants have carried their initial burden of establishing the affirmative defense that any interference in the profit sharing agreements was, in any event, justified. "Whether an intentional interference . . . is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances, including the nature of the actor's conduct and the relationship between the parties." (*Herron*, *supra*, 56 Cal.2d at p. 206; *Richardson*, *supra*, 98 Cal.App.3d at pp. 80-81.) Because it is undisputed that defendants demanded plaintiff's withdrawal as a means of avoiding the appearance of impropriety, and because the interest in doing so is an undeniably legitimate and important interest vis-à-vis the Centinela entities' interest in obtaining a future contract, the burden shifts to plaintiff to raise a triable issue of fact on the issue of justification.

Plaintiff has not do so, as none of the five groups of arguments he raises creates a triable issue.

First, plaintiff asserts that defendants' conduct was not justified because they were motivated by racial animus, and not reputational concerns. We have already rejected this assertion.

Second, plaintiff contends that defendants have not demonstrated that they *actually* relied upon concerns about his reputation because (1) the trial court sustained an objection to

one memo prepared by one of PCA's principals; and (2) it is not undisputed, and the court merely "assumed," that CalPERS was motivated by the reputational concerns mentioned in PCA's report. We reject these contentions. The trial court's exclusion of the memo is of no consequence because the same evidence was presented in the PCA's principal's deposition testimony and in PCA's report, neither of which was excluded. And although Dear died prior to trial and was thus unavailable to testify that he relied on PCA's reputational concerns, it is undisputed that (1) other CalPERS employees testified that CalPERS relied on PCA's report regarding reputational concerns in making its decisions regarding the Centinela entities, and (2) the attendees of the February 2011 meeting all said that Dear cited plaintiff's "fitness and judgment issue"—in other words, plaintiff's decision to have affiliations with influence peddlers—as the reason for requesting plaintiff's disassociation. Plaintiff's assertion that Dear was relying on some other, unspoken reason is entirely speculative, and thus does not raise a triable issue of fact.

Third, plaintiff argues that the justification defense requires that a defendant act in good faith and that, under *Richardson*, *supra*, 98 Cal.App.3d 73, a defendant does not act in good faith if he relies on the advice of another that turns out to be wrong. Consequently, defendant reasons, CalPERS's reliance on PCA's investigation and findings was not in good faith because PCA ended up being wrong (or, at a minimum, there is a triable issue of fact as to whether PCA was wrong because the references it spoke to now deny saying what PCA said they said). To be sure, *Richardson* read a "good faith" requirement into the justification defense, held that a "good faith" belief must have a "reasonable basis," and concluded that there is a triable issue of

fact as to whether a defendant acts in good faith with an objective basis when he takes a position based upon the legal analysis of his lawyer that the lawyer knew, at the time, was debatable. (*Id.* at pp. 78-81.) *Richardson's* holding expressly rested on its concern that "equat[ing] reliance on an attorney's advice with 'good faith'" might create "a blanket rule of immunity" for "parties . . . who seek and obtain counsel." (*Id.* at pp. 82-83.) It is unclear if *Richardson* applies to information obtained from others who are not lawyers. But even if it does, *Richardson* does not create any triable issues of fact as to defendants' good faith in this case. That is because CalPERS's concern about the appearance of impropriety has a valid and legitimate legal basis and because PCA (and hence CalPERS and Dear) had an objective (and, at that point in time, undisputed) factual basis for their belief that plaintiff posed a reputational risk for CalPERS—namely, the statements of the references who reported plaintiff's affiliations with known influence peddlers. More to the point, *Richardson* does not support the far broader principle plaintiff extrapolates from it—that is, that there is a triable issue of fact if a party relies on the advice of anyone else that turns out to be wrong based on evidence adduced years after the fact. (Accord, *In re Arron C.* (1997) 59 Cal.App.4th 1365, 1372 [reliance on "information later proved to be incorrect" does not retroactively mean that officers did not act "'reasonabl[y]' and 'in good faith'"].) What is more, any deficiencies in PCA's investigation are not attributable to CalPERS or Dear because it is undisputed that they had no involvement in, or control over, that investigation.

Fourth, plaintiff posits that justification cannot be decided on summary judgment because (1) it is an affirmative defense, and (2) it involves an issue of good faith, which is a jury question.

Plaintiff's first assertion is of no moment because, as discussed above, a defendant able to establish an affirmative defense as a matter of law is entitled to summary judgment. (§ 437c, subd. (*o*)(2).) Plaintiff's second assertion is of no moment because, while issues of good faith are "ordinarily a question of fact to be determined by a jury . . . , '[t]he question becomes one of law . . . when, because there are no conflicting inferences, reasonable minds could not differ. [Citations.]'" (*Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (2001) 90 Cal.App.4th 335, 350.) Here, for the reasons discussed above, plaintiff has failed to raise any triable issues of fact regarding the question of justification.

Fifth, plaintiff and defendants dispute whether a plaintiff may sue for intentional interference with an at-will contract. We need not weigh in on this dispute because it is irrelevant to plaintiff's claim, which is premised on CalPERS's interference with the profit sharing agreements, which are not at-will agreements. The fact that the Link I and Link II contracts are at-will is irrelevant.

The trial court properly granted summary judgment on plaintiff's intentional interference with a contractual relation claim.[8]

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8 In light of the reasoning we use to reach this conclusion, we have no occasion to decide whether (1) plaintiff had no reasonable alternative but to succumb to CalPERS's demands (the second element of economic duress), (2) plaintiff raised a triable issue of fact regarding disruption of the profit sharing agreements, or (3) plaintiff raised a triable issue of fact regarding CalPERS's knowledge of the Settlement Agreement.

III. Interference With Prospective Economic Advantage Claims

To establish a claim for *intentional* interference with a prospective economic advantage, a plaintiff must establish "(1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) *intentionally wrongful acts designed to disrupt the relationship*; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action." (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512, italics added.) To establish a claim for *negligent* interference with a prospective economic advantage, a plaintiff must establish the same elements except the third, italicized element is replaced with a requirement that the plaintiff establish (3a) the defendant's "knowledge (actual or constru[ctive]) that the relationship would be disrupted if the defendant failed to act with reasonable care," and (3b) "the defendant's failure to act with reasonable care." (*Redfearn*, *supra*, 20 Cal.App.5th at p. 1005.) As to *both* types of interference, the plaintiff must show that the defendant's act—whether intentional or negligent—is "independently wrongful." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1158.) "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." (*Id.* at p. 1159.) The trial court properly granted summary judgment on both of plaintiff's interference with a prospective economic advantage claims because, for the reasons discussed above, plaintiff never raised a triable issue of fact that defendants' interference was independently wrongful.

IV. Plaintiff's Motion for Summary Adjudication

In light of our conclusion that the trial court properly granted summary judgment in favor of CalPERS, plaintiff's motion for summary adjudication is moot.

DISPOSITION

The judgment is affirmed. CalPERS is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ