HUNTER v. FISHER

SPECIAL MOTIONS TO STRIKE (SLAPP MOTIONS); MOTION FOR LEAVE TO PROPOUND DISCOVERY

Date of Hearing: January 15, 2014 Trial Date: None
Department: D Case No.: LC100771

MOTIONS

Wior and Fisher have filed a SLAPP motion aimed at the 5th-9th, 11th and 13th-14th causes of action.

NBPA has filed a SLAPP motion aimed at the 1st through 4th causes of action.

Plaintiff has filed one consolidated opposition to the SLAPP motions.

Plaintiff has also filed a Motion to Allow Plaintiff to Conduct Discovery.

TENTATIVE: 1) THE ANTI-SLAPP MOTION OF NPBA IS DENIED. ✓

2) THE ANTI-SLAPP MOTION OF WIOR IS GRANTED. ✓

3) THE ANTI-SLAPP MOTION OF FISHER IS DENIED AS TO THE 5th AND 6TH CAUSES OF ACTION AND GRANTED AS TO THE 5TH, 6TH, 9TH, 11TH, 13TH AND 14TH CAUSES OF ACTION. 7 8

4) THE COURT WILL SET A MOTION FOR ATTORNEYS FEES FOR HEARING. ✓

5) THE MOTION TO CONDUCT DISCOVERY IS DENIED. ✓

ALLEGED FACTS

This motion was originally filed in Alameda county and later transferred to LASC. The case was deemed non-complex and has been assigned to Dept. D.

Complaint

Plaintiff is Billy Hunter. He alleges that he served as the Executive Director of the National Basketball Players Association ("NBPA" or "the Union"), which is the players collective bargaining labor union. Hunter was hired by the NBPA through a written contract in 1996 for a three year term. Three extensions were made to the contract including an extension in 2010 which was signed by NBPA president Derek Fisher. The 2010 Extension continued Hunter's term to June 30, 2015.

Defendant Fisher was an NBA player and the president of NBPA. Defendant Wior was Fisher's publicist and manager.

On June 30, 2011 the CBA expired and the NBA owners locked out the players resulting in a work stoppage. One of the primary sticking points was the players' share of the Basketball Related Income ("BRI"). Plaintiff alleges that the lock out was disadvantageous to Fisher in particular because Fisher was coming to the end of his career and would be unlikely to recover the lost income.

Plaintiff alleges that as retaliation for the disagreement regarding Union Negotiations, Fisher and Wior waged a campaign to displace Hunter as the Union's Executive Director. Fisher and Wior attempted to cause an audit of the Union to be commenced by a DC law firm. The Executive Committee sought Fisher's resignation after a vote of no confidence. Hunter claims that Fisher and Wior then caused a number of articles to appear in the press that presented Hunter's stewardship of the Union in a negative light. This negative attention led the Executive Committee to form a Special Committee to supervise an internal investigation.

The report of the internal investigation was released to the general public via a website. The report concluded that Hunter committed no criminal acts but had made some missteps in his duties as Executive Director. These misstepps included hiring his adult children for positions in the NBPA and improperly accepting a payout of his accrued vacation time. Plaintiff alleges that Fisher made false statements to the investigators in order to paint Hunter in a false light, including that Fisher was unaware that Hunter had hired his daughter's lawfirm to represent the NBPA; and that Hunter had tried to bribe Fisher with an expensive watch.

Plaintiff states that he was given no opportunity to respond to the report. Plaintiff was told by other members of the Executive Committee that he could keep his job if he terminated his children from their employment with the NBPA. Plaintiff fired his two children but it became clear that he was going to be fired anyway.

Plaintiff was ultimately terminated before his contract was completed and barred from his office without the opportunity to collect his personal belongings. The NBPA disavowed the contract, stating that it was not properly negotiated, executed, or approved and as such was null void, invalid and unenforceable. Fisher held a press conference at which he accused Hunter of dividing, misleading, and misinforming the Union and players and of propounding threats and lies against the Union.

On May 16, 2013, plaintiff filed in Alameda County Superior Court a complaint alleging

1. Breach of Express Contract (NBPA and Fisher)
2. Breach of Express Contract by Repudiation (NBPA and Fisher)
3. Breach of Implied in Fact Contract (NBPA and Fisher)
4. Breach of Covenant of Good Faith and Fair Dealing (NBPA and Fisher)
5. Inducing Breach of Contract (Fisher and Wior)
6. Intentional Interference with Contractual Relations (Fisher and Wior)
7. Intentional Interference with Prospective Economic Relations (Fisher and Wior)
8. Negligence Interference with Prospective Economic Relations (Fisher and Wior)
9. Intentional Misrepresentation (Fisher)
10. Intentional Misrepresentation (Fisher)
11. Concealment (Fisher)
12. Negligent Misrepresentation (Fisher)
13. Defamation per se (Fisher)
14. Defamation per quod (Fisher)

In response to defendant NBPA's motion to transfer venue, the case was ordered transferred to LASC on or around August 15, 2013.

Defendants' Factual Contentions

In 2011 NBA players raised questions regarding Hunter's self-dealing and other conduct. Hunter made a payout to himself of a million dollars in alleged unused vacation funds. In response on April 25, 2012, the US Attorney's'Office issued a subpoena to the Union calling for the production of financial and other business records. In the days before the government issued the subpoena, numerous media outlets reported Hunter's nepotism, conflicts of interest and possible misuse of Union funds.

Shortly after the subpoena, the Executive Committee formed a six member Special Committee which was charged with supervising an internal investigation into Hunter's conduct. The Special Committee retained the Paul Weiss law firm to conduct the investigation and respond to the government subpoena.

As part of the investigation and response to the government subpoena, Paul Weiss interviewed Fisher, the NBPA president and more than 3 dozen union members, employees including Hunter and others. Paul Weiss retained Deloitte Financial Advisory Services to assist with the accounting aspect of the investigation. As a result of the investigation, Paul Weiss issued a Report setting forth the investigators findings.

The Report found no criminal conduct. However, the Report did find that Hunter took actions that were inconsistent with his fiduciary obligations to the NBPA, displayed poor judgment, paid little attention to the appearance of impropriety created by his conduct and failed to properly manage conflicts of interest. The report was posted to a publicly available website on January 17, 2013. On February 14, 2013, Hunter released his response to the report and posted it to a publically available website.

On February 16, 2013, the Union's Board of Player Representatives voted 24-0 to terminate Hunter's employment. Hunter was notified by letter the next day.

DISCUSSION:

Anti- SLAPP Statute

Code of Civil Procedure section 425.16 provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue shall be subject to a special motion to strike unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc. § 425.16, subd. (b).) Such a motion involves a two-step analysis, in which the court must first determine whether a movant "has made a threshold showing that the challenged cause of action is one arising from protected activity . . . ." (Taus v. Loftus (2007) 40 Cal.4th 683, 712 [54 Cal.Rptr.3d 775, 151 P.3d 1185], quoting Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67 [124 Cal.Rptr.2d 507, 52 P.3d 685].) If the court so finds, it must then examine whether the respondent has demonstrated a probability of prevailing on the claim. (Taus, supra, 40 Cal.4th at p. 712.)

Protected Conduct

An act in furtherance of a person's right to petition or free speech under the United States Constitution or California Constitution includes ": (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other

official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc. § 425.16.)

Breach of Contract Claims

Protected Conduct

Despite the lengthy description in the complaint of the CBA negotiations and the subsequent investigation of Mr. Hunter, the breach of contract claims 1, 3 and 4 allege that the breach occurred when Fisher and the NBPA discharged Hunter before the end of his employment term under the Employment Contract and 2010 Extension, including the additional one-year option period provided for in the 2010 Extension. (see Compt. Para. 106, 121, and 127). Further the complained of conduct in the second cause of action (Breach of Contract by Repudiation) is grounded on the following conduct:

111. Fisher and NBPA have asserted without qualification that they never entered into a contract with Hunter and denied the very existence of the Employment Contract and the 2010 Extension.
112. Fisher and NBPA clearly and positively indicated to Hunter that they would not meet the requirements of the contract, thereby expressly repudiating the Employment Contract and the 2010 Extension.

While defendants argue that the breach of contract claims are based on protected conduct - i.e. the investigation, report and consequences of the report, the graveman of the breach of contract claims are simply that the NBPA terminated the contract. Whether this states a breach is not relevant to the analysis under the first prong of the SLAPP statute.

The phrase "any other official proceeding authorized by law" in C.C.P. 425.16(e)(1) and(2) is not limited to proceedings before governmental entities. Thus, a hospital's peer review process, which is mandated by California law, is protected by the statute. Kibler v. Northern Inyo County Local Hosp. Dist. (2006) 39 Cal.4th 192, 199, (disapproving Fontani v. Wells Fargo Inv., LLC (2005) 129 Cal.App.4th 719, 728 to extent it suggests that C.C.P. 425.16(e)(2) only applies to entities exercising governmental power)

Plaintiff relies upon Olaes v. Nationwide Mut. Ins. Co. (2006) 135 Cal.App.4th 1501 where the court found that the phrase "any other official proceeding," as used in C.C.P. 425.16(e)(1), is intended to protect speech concerning matters of public interest in governmental forum. The statutory language did not cover alleged defamatory statements made by defendant employer

during its investigation into allegations of sexual harassment by plaintiff. Even the fact that employer has statutory duty to investigate claims of sexual harassment does not turn investigation into "official proceeding" See also Carpenter v. Jack In The Box Corp. (2007) 151 Cal.App.4th 454, 472 (Statements made as to an employer's investigation of an employee's alleged sexual harassment were not protected as an official proceeding authorized by law, or as an issue of public interest.); Kibler v. Northern Inyo County Local Hospital District (2006) 39 Cal.4th 192; Smith v. Adventist Health System/West (2010) 190 Cal.App.4th 40, 62, (defendant's act of "screening out" plaintiff's reapplication for hospital privileges because 36-month waiting period had not passed since summary suspension did not constitute official proceeding for purposes of C.C.P. 425.16; there was no evidence that peer review committee was involved in determination of eligibility or that act was performed pursuant to statutory procedures or accompanied by right to administrative hearing); Nesson v. Northern Inyo County Local Hosp. Dist. (2012) 204 Cal.App.4th 65, 81, (distinguishing Smith; hospital's district board acted as peer review body in terminating contract with suspended physician regarding radiology services; physician's duties pursuant to agreement were "inextricably intertwined" with practice of medicine.) The court notes that cases involving physician peer review are distinguishable since in those cases peer review is mandated by law. See Bus. & Prof. Code, § 805 et seq.

Defendants argue that, the internal investigation was done as a result of a subpoena by a grand jury. The investigation was originally intended to assist the Union's representatives in responding to the subpoena. Defendants cite Greka Integrated, Inc. v. Lowrey (2006) 133 Cal. App. 4th 1572, 1579-80 for the proposition that defendant's response to subpoena is protected under the SLAPP statute. In Greka the court noted:

> [Defendant argued that he] disclosed information related solely to Greka's non-compliance with law and the identity of those who were informed of this non-compliance of law to officials at various public agencies; the district attorney; his own attorney; in response to a deposition subpoena in the Lopez matter; and to family and friends to explain why he could no longer work for Greka. In addition, Jerry Lulejian, the deputy district attorney responsible for the County's litigation against Greka, stated that he provided a copy of Lowrey's deposition transcript in the Lopez matter to a newspaper reporter who quoted it in a story published in September 2003. Lowrey also testified in the County's action, in response to a subpoena.
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> In their opposing declarations, Greka's chief executive officer, Randeep S. Grewal, and its counsel Jeffrey Valle, cite two incidents to support Greka's causes of action. First, in August 2004, Lowrey's name appeared on Unocal's witness list in a lawsuit against Greka that is unrelated to Lowrey's former job duties. Second, in September 2004, an expert witness for Greka's opponent in a collection matter, Santa Maria Refining Company d/b/a Greka Energy v. Hanson Aggregates Mid–Pacific Inc. (Super. Ct. Santa

> Barbara County, No. 1133280) (Hanson), testified that he "had had discussions with former Greka employees ... whose names he could not recall, who told him negative things about Greka's business practices."
>
> The declarations supporting and opposing the motion to strike demonstrate that Lowrey disclosed information about Greka **to his counsel, to authorities and in deposition and trial testimony in response to subpoenas**. These are all protected activities. (425.16, subd. (e)(1) (statements made "before a legislative, executive or judicial proceeding or any other official proceeding authorized by law are protected activity).) Accordingly, Lowrey met his burden to show the complaint arose from protected speech. Greka's declarations do not refute this prima facie case because Greka submitted no evidence that Lowrey was involved in Unocal's decision to place his name on its witness or list, or that Lowrey was one of the employees who spoke to the expert witness in Hanson. Accordingly, we conclude, as did the trial court, that the acts underlying Greka's causes of action against Lowrey were protected speech.

Greka Integrated, Inc. v. Lowrey (2005) 133 Cal.App.4th 1572, 1579-1580.

Here the alleged statements were made to internal investigators responding to a government subpoena – in other words, in connection with a an official proceeding authorized by law - and under Greka are protected statements. Further, labor unions are required to investigate and provide detailed statements of discipline or removal of agents for breach of trust. See 29 USC § 4319a)(5)(H). This obligation is analogous to the obligation of hospitals to peer review their doctors.

The court find the conduct is protected under section 425.16(e)(2).

Defendants also allege that the beach of contract claims are protected under Section 425.16(e)(4) because Hunter alleges that his termination was prompted by statements made to the press by Wior or Fisher and statements made by Fisher to the internal investigators. Defendants cite paragraphs 85 and 90 of the complaint. While these paragraphs do not allege any statements to the press, paragraph 90 does allege that Fisher made statements to the internal investigator. The court must consider whether those statements qualify as "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

The NBA and its collective bargaining agreement negotiations in general are undoubtedly matters of public interest and Mr. Hunter qualifies as a public figure. Moreover, the evidence supports that the issues of Hunter's leadership including the hiring of his family members, the federal subpoena issued and the possible termination of Mr. Hunter's employment were

matters of public interest and widely reported in the sports press. See Declaration. Of Harmle, Ex. F.

The evidence does not show that the public interest in Hunter's job performance was created by Fisher's statements. The NBA, including the players union and the 2010 collective bargaining negotiations were widely followed by the American public. The evidence reflects that the US Attorney's office subpoena was also an event that spurred a great deal of media and public interest in Hunter's job performance. Even plaintiff submits media articles that are connected to his job performance that predate Fisher's alleged statements. The court rejects plaintiff's argument in this regard.

Accordingly, the court agrees that the conduct that forms the basis of the allegations in the first through fourth causes of action qualify as "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

The court notes that in his opposition Hunter argues that the gravaman of his breach claims is not simply his termination but rather that the 2010 Extension allowed the NBPA to terminate Hunter for cause in which it was required to pay for the remaining contract year or without cause in which case Hunter would be entitled to his annual salary and benefits for the remainder of the contract. Hunter alleges in his opposition that the breach of the contract was the fact that he was paid nothing after his termination in contravention of the contract terms. This allegation may shift the focus of the analysis from the investigation that prompted the termination to whether the contract was followed post termination. However, Mr. Hunter does not plead these facts in his complaint. Instead, he pleads that the breach occurred when Fisher and the NBPA discharged Hunter before the end of his employment term under the Employment Contract and 2010 Extension, including the additional one-year option period provided for in the 2010 Extension. (see Compt. Para. 106, 121, and 127).

As to the contract claims, the first prong is satisfied.

Probability That the Plaintiff Will Prevail on the Contract Claims

If moving parties successfully have shifted the burden, then opposing parties must demonstrate a probability of prevailing on the merits of the complaint. Equilon Ent., LLC v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67; Matson v. Dvorak (1995) 40 Cal.App.4th 539, 548; §425.16(b)(1). To establish such a probability, a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts, which, if credited by the trier of fact, is sufficient to sustain a favorable judgment. Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal.App.4th 1424, 1435; Navellier v. Sletten (2002) 29 Cal.4th 82, 88.

As previously noted, plaintiff's description of his contract claims are inconsistent with the claims as pled. Specifically, the claims as pled simply identify the breach as the termination of the contract and/or the repudiation of the contract. Plaintiff's opposition appears to be asserting that the breach was the termination without pay - either the remaining annual salary if the termination is for cause or the remaining total salary if the termination is not for cause. "As is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings." Paiva v. Nichols (2008) 168 Cal. App. 4th 1007, 1017; Paulus v. Bob Lynch Ford (2006) 139 Cal. App. 4th 659, 672. Accordingly, for purposes of the SLAPP analysis this court will discuss the contract claims as pled.

> To show a probability of prevailing for purposes of section 425.16, a plaintiff must make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor.' [Citation.] (ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1010, 113 Cal.Rptr.2d 625; see also Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, 821, 123 Cal.Rptr.2d 19, 50 P.3d 733 [plaintiff must demonstrate that the complaint is ... supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.].) [T]he plaintiff cannot simply rely on the allegations in the complaint' [citation]...." (ComputerXpress, Inc. v. Jackson, supra, 93 Cal.App.4th at p. 1010, 113 Cal.Rptr.2d 625.) Rather, "'[t]he plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.]....'" (Stewart v. Rolling Stone LLC (2010) 181 Cal.App.4th 664, 679, 105 Cal.Rptr.3d 98.) "Thus, declarations that lack foundation or personal knowledge, or that are argumentative, speculative, impermissible opinion, hearsay, or conclusory are to be disregarded." (Gilbert v. Sykes (2007) 147 Cal.App.4th 13, 26, 53 Cal.Rptr.3d 752.)

Alpha and Omega Development, LP v. Whillock Contracting, Inc. (2011) 200 Cal.App.4th 656, 663-64.

Defendants cannot defeat plaintiffs' showings by presenting evidence contradicting that evidence, without establishing as a matter of law that plaintiffs cannot prevail. Fremont Reorganizing Corp. v. Faigin (2011) 198 Cal.App.4th 1153, 1166.

For purposes of the SLAPP motion, Hunter has demonstrated that he and the NBPA entered into a written employment agreement and that Fisher executed the 2010 Extension as NBPA president. See Hunter Declaration. Ex. 1 and 4. (As noted, the only breach identified in the complaint is that the Union discharged Hunter before the end of the term of the contract.)

NBPA argues that the agreement was never ratified by the board as required and as such is unenforceable. The NBPA relies upon Article V. Section 1 of its Constitution and By Laws. (Ex. 7 to Hunter Declaration.

The provision provides:

> The Executive Director shall be appointed by the Board of Player Representatives and the Executive Committee of the Players Association. The Executive Director, and the terms of his employment contract, must be approved by two-thirds (2/3) of the combined total of all Board of Player Representatives and Executive Committee Members.

The court does not find this provision crystal clear as to whether the last sentence applies to contract extensions which extend a contract already ratified on virtually the same terms.

Moreover, in general, executive officers have implied authority to bind an organization to contracts in the ordinary course of business. See e.g. Grummet v. Fresno Glazed Cement Pipe Co. (1919) 181 Cal. 509, 513, (ordinary contract of employment); Moore v. Phillips (1959) 176 Cal.App.2d 702, 709. Furthermore the evidence suggests that the contract was approved by the Executive Committee.

The evidence also shows that the course of business between these parties never required board ratification for extensions. A NBPA president had signed extensions on the Hunter contract on two previous occasions without the need for Board ratification. The Union was clearly aware of this and did not take any steps to prevent its officers from proceeding in this manner. See Preis v. Preis v. American Indemnity Co. (1990) 220 Cal.App.3d 752, 761. At the very least Hunter has demonstrated prima facie evidence showing ostensible agency in response to NBPA's defense that the contract never existed because it was not properly ratified by the Board.

It is also noted that disavowing the 2010 Extension did not occur immediately but arose after their existed a dispute between Hunter and Fisher. Prior to that time the parties acted as if the contract was valid and enforceable. The plaintiff has presented prima facie evidence that defendants are estopped from denying the contract. See Berry v. Maywood Mut. W. Co. No. One (1939) 13 Cal. 2d 185, 190.

The biggest hurdle for the plaintiff is the fact that plaintiff does not describe the breach. Defendants were entitled to terminate his contract. Plaintiff has explained that does not excuse payment but as noted does not plead this. Recent case law has noted that amendment is permitted to conform to proof on a SLAPP motion. Nguyen-Lam v. Cao (2009) 171 Cal. App. 4th 858, 873 (as to SLAPP motions, courts can permit plaintiff to amend complaint to conform to proof showing a probability of prevailing distinguishing and disagreeing with Simmons v. Allstate

Ins. Co. (2001) 92 C.A.4th 1068, 112 C.R.2d 397, to extent it suggests that C.C.P. 425.16 erects absolute bar to amendment]; see Martin v. Inland Empire Util. Agency (2011) 198 C.A.4th 611, 626, 629, 130 C.R.3d 410 [distinguishing Simmons and Nguyen-Lam; where defendant failed to make prima facie showing that allegedly defamatory statements were protected speech, granting anti-SLAPP motion to defamation cause of action with leave to amend was functional equivalent of order denying motion].)

The court believes in this case that the plaintiff can amend to clarify that the allegations of breach are directed at the failure to comply with the provision regarding payment of salary after termination because plaintiff has demonstrated that there was an enforceable contract and that the contract required payment in the event of termination. See Ex. 4 to Hunter Declaration at Section 6.

Plaintiff also argues that the termination was not for cause. Defendant has responded to that argument by attempting to demonstrate that the internal investigation report gave it grounds to reasonably believe that misconduct took place. See Silva v. Lucky Stores, Inc. (1998) 65 Cal. App. 4th 256. This is a disputed issue of fact and the court is satisfied that Hunter has provided sufficient evidence in the form of declarations from former Union Executive Committee members that there was not good cause to fire him and that the internal investigation was spurred by personal disputes between himself and Fisher.

Defendant also argues that the 90 day arbitration provision in the contract has expired and accordingly the case is time barred. This matter was filed within 90 days of receiving the termination letter. This court finds that CCP § 1281.12 tolls the provision.

Finally, the court notes that the four causes of action are pled in the alternative. For the purposes of the SLAPP motion, the court cannot find that there is no probability of prevailing on the merits simply because one theory may end up to be the theory that is borne out by the evidence. There is ample evidence on each of the four claims.

Interference Claims

Protected Conduct

Hunter pleads Inducing Breach of Contract, Intentional Interference with Contractual Relations, Intentional Interference with Prospective Economic Relations, Negligence Interference with Prospective Economic Relations. These claims are alleged against Fisher and Wior.

The claims are grounded on Fisher's and Wior's wrongful actions as alleged more particularly above. See Complt. 134, 141, 149, and 160. In other words, the actions taken by Fisher and Wior as described in the introductory and factual section of the complaint is the basis of the

wrongful conduct.(Paras. 1-101). Included in these factual allegations are that Fisher made public statements on behalf of the NBPA and disseminated messages to the players when it was not appropriate to do so (Para. 56), covertly negotiated with certain NBA team owners undermining the Union and Hunter's bargaining position (Para. 62), attempted to hire a DC law firm to conduct a Union audit without authority of the Executive Committee (Para. 80), that Wior orchestrated a press campaign designed to muddy Hunter's reputation (Para 84), made statements to the internal investigators regarding hiring of Hunter's relatives in a way that impugned Hunter's good character and accused Hunter of bribery to the internal investigators (Para. 90 and 91) and held a press conference making accusations against Hunter (Para. 100). Wior is accused of inserting herself into the NBPA's internal affairs and encouraging the actions of Fisher. See e.g. Complt Para 4, 56, 68 and 84..

As discussed above, at least some of the conduct described such as the statements to internal investigators is protected under the SLAPP statute. Holding a press conference is also protected under both subdivsion (e)(3) (any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest) and (e)(4) (as already discussed). Likewise as to Wior, drafting statements to be delivered at a press conference and engaging in a press campaign falls under her constitutional right of free speech in connection with an issue of public interest.

Probability of Success on the Merits of Inducement and Interference Claims

First, the court notes that the intentional interference with prospective economic advantage appears to be pled in the alternative, in the event that the evidence demonstrates that there is no enforceable contract. See Bed, Bath & Beyond of La Jolla v. La Jolla Vill. Square Venture Partners (1997) 52 Cal. App. 4th 867, 878 ("'a cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing enforceable contract, only a claim for interference with prospective advantage may be pleaded.'"). The court has already determined that there is sufficient prima facie evidence to show that there is an enforceable contract between Hunter and NBPA.

To show a inducing a breach of a contract or intentional interference with a contract, plaintiff must show:
(Inducing Breach)

1. Plaintiff had a valid, existing contract with a third party;
2. defendant had knowledge of the contract;
3. defendant intended to induce its breach;
4. the contract was in fact breached;
5. the breach was caused by defendant's unjustified or wrongful conduct (including intentionally interfering with an existing contract); and
6. resulting damages.

Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 122-123. See also Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1158 ("[W]hile intentionally interfering with an existing contract is "a wrong in and of itself" .... intentionally interfering with a plaintiff's prospective economic advantage is not.").

(Intentional Interference)
1. Valid contract between plaintiff and third party;
2. defendant's knowledge of that;
3. defendant's intentional acts designed to induce disruption of the relationship;
4. actual disruption; and
5. resulting damage.

Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1148; Scripps Clinic v. Superior Court (2003) 108 Cal. App. 4th 917, 929; Golden W. Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 50 (to show disruption, it is sufficient to show the defendant's conduct made the plaintiff's performance under the contract more burdensome or costly.).

The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal.3d 1118, 1126. For practical purposes the torts of negligent or intentional interference with economic relations require that the plaintiff prove an independently wrongful act separate from the interference itself. Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 392-393

These claims are very similar and will be analyzed together. The evidence shows a valid contract between plaintiff and the NPBA and Fisher and Wior's knowledge of the contract.

Defendant Fisher argues that the he cannot incur liability for his conduct in making statement to the internal investigator because such statements were true, citing ComputerXpress, inc. v. Jackson (2001) 93 Cal. App. 4th 993, 1014. While this is a correct statement of the law, Hunter has provided sufficient evidence to dispute whether the statements Fisher made were true including declarations from other NPBA Executive Committee member that dispute whether Fisher was unaware that Hunter's daughter worked for the law firm used by the NBPA and whether Fisher considered and treated the $20,000 watch he received as a gift as a bribe, considering he kept the watch and never offered to give it back or expressed his discomfort with

accepting it until three years after he accepted the watch. Whether the comments were true or believed to be true by Fisher is a triable issue of fact, not capable of resolution on this motion.

Defendants also allege that their conduct was too attenuated to meet the intent and causation elements. In Tuschscher Dev. Enters, Inc. v. San Diego Unified Port Dsit (2003) 106 Cal. App. 4th 1219 the court explained what intent is required:

> The required intent is shown if the defendant "knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action. (Quelimane, at p. 56, 77 Cal.Rptr.2d 709, 960 P.2d 513.) Whether the interference was justified as merely incidental to the defendant's legitimate pursuit of his own interests is a question of fact. (Ibid.)

Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist. 106 Cal.App.4th 1219, 1239.

The court agrees that the actions of Wior do not meet the intent requirements. Writing press releases for Fisher regarding issues connected to the CBA did not necessarily result in Hunter's termination. Hunter presents no evidence of Wior's involvement in the internal investigation. However, as to Fisher, focusing on the statements to the internal investigators, the court finds a causal connection between those acts and Hunter's termination.

Fisher also argues that he cannot be held liable for these claims because he was acting on behalf of a party to the contract. It is true that only a stranger can be liable for interference. Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594, 1603-1604. However, our courts have allowed contract interference claims to be stated against owners, officers, and directors of the company whose contract was the subject of the litigation. While those defendants may attempt to prove that their conduct was privileged or justified, that is a defense which must be pleaded and proved. Woods v. Fox Broadcasting Sub., Inc. (2005) 129 Cal.App.4th 344, 356. Further, although a seemingly fanciful assertion, Hunter has sufficiently alleged that Fisher was not acting as an agent of the Union when he made certain statements but was acting in his own self-interest to secure a front office position when he no longer played and also out of spite when he intimated to the internal investigators that Hunter was involved in misconduct.

Furthermore, regarding the negligent interference claim as noted in Lange v. TIG Insurance Company (1998) 68 Cal.App.4th 1179, 1187:

> " 'The tort of negligent interference with economic relationship arises only when the defendant owes the plaintiff a duty of care.' [Citation.]" (LiMandri v. Judkins (1997) 52

> Cal.App.4th 326, 348 [60 Cal.Rptr.2d 539], italics omitted.) As Professor Witkin explained, among the criteria for establishing a duty of care is the "blameworthiness" of the defendant's conduct. (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 661, p. 755; see also J'Aire Corp. v. Gregory (1979) 24 Cal.3d 799, 805 [157 Cal.Rptr. 407, 598 P.2d 60].) For negligent interference, a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself. (Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 392-393 [45 Cal.Rptr.2d 436, 902 P.2d 740] ["... a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful ' by some measure beyond the fact of the interference itself.' "]; National Medical Transportation Network v. Deloitte & Touche (1998) 62 Cal.App.4th 412, 439-440 [72 Cal.Rptr.2d 720] [the independently wrongful requirement applies to negligent interference claims].)

The problems with interference with economic relations claims against Fisher and Wior is that Hunter has not shown an independently wrongful act. The defamation and fraud claims as discussed below cannot survive and accordingly cannot stand in for the wrongful act. Further, Hunter has not alleged a legal duty running from Fisher or Wior to Hunter.

Accordingly, the court grants the SLAPP motion as to Wior on these claims and as to Fisher on the 7 and 8th causes of action but denies the motion as to Fisher on the 5th and 6th causes of action.

Misrepresentation Claims

Hunter has sued Fisher on two counts of intentional misrepresentation, a negligent misrepresentation claim and a claim for concealment. One of the intentional misrepresentation claims and the concealment claim are grounded on the allegation that Fisher represented to Hunter and to the press that he had not been secretly negotiating with certain NBA team owners during the CBA negotiations of 2011 when, according to Hunter, he had been so negotiating. (Para. 165 and 182) The other intentional misrepresentation claim and the negligent misrepresentation claim are based on the allegation that Fisher warranted that he had the authority to sign the 2010 Extension on behalf of the NBPA and bind the NBPA to the terms of the agreement when in fact Fisher now denies that he had such authority. (Para. 174 and 190). The 10th and 12th causes of action grounded on Fisher's authority to sign the contract are not challenged by way of the SLAPP motion.

Regarding the former group of claims, the court finds that statements to the press regarding the CBA negotiations are protected under both subdivsion (e)(3) (any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest) and (e)(4) (as already discussed).

Probability of Plaintiff Prevailing on the Misrepresentation Claims

To recover on a fraud claim a plaintiff must plead and prove:

(Intentional misrepresentation)

1. misrepresentation;
2. knowledge of falsity (or "scienter");
3. intent to defraud (induce reliance);
4. justifiable reliance; and,
5. resulting damage.

Charnay v. Cobert (2006) 145 Cal.App.4th 170, 184; Small v. Fritz Companies, Inc. (2003) 30 Cal. 4th 167, 173.

(Concealment)

1. Defendant concealed or suppressed a material fact;
2. defendant was under a duty to disclose the fact to the plaintiff;
3. defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff;
4. plaintiff was unaware of the fact and would not have acted in the same way knowing of the concealed or suppressed fact;
5. causation; and
6. the plaintiff sustained damage.

Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC (2008) 162 Cal.App.4th 858, 868; Lovejoy v. AT&T Corp. (2001) 92 Cal. App. 4th 85, 96; Hahn v. Mirda (2007) 147 Cal.App.4th 740, 748

Hunter alleges that Fisher's alleged deception regarding whether Fisher was secretly negotiating with the owners during the 2011 CBA negotiations and lockout undermined Hunter's bargaining position which later led to a loss of confidence by the Union and his eventual termination.

In the first instance, Hunter has provided no admissible competent evidence that Fisher actually did secretly negotiate. He presents his own declaration stating that he believed Fisher had lied about secretly negotiating because of Fisher's demeanor, facial expression and manner of speaking during the negotiating session after Hunter confronted him. Hunter has also provided declarations of others who state that they believe Fisher lied. See e.g. Declarations of Maurice Evans; Etan Thomas; and Theophalus Ratliff. However, these statements are simply speculation and not evidence that Fisher actually did secretly negotiate with the owners.

Further, Hunter has not made a prima facie showing that the CBA negotiations resulted in a loss of confidence and led to the termination of his contract. The termination of his contract was due to an internal investigation. Hard feelings on Fisher's part for the confrontation between Fisher and Hunter regarding accusations of secret negotiations may have led to Fisher instigating an investigation but this is not a close enough connection for Hunter to hold Fisher liable.

Finally, as to the concealment claim, Hunter has not pled nor provided evidence of a duty to him by Fisher to speak.

The SLAPP motion is granted as to these claims.

Defamation Claims

The two defamation claims against Fisher are based on the following:

> Claiming to be aware of conduct by Hunter that might be subject to , and might subject other to, criminal liability;
>
> Claiming to have been unaware that Hunter's daughter was employed by the prominent Washington D. C.- based law firm that Hunter retained to represent the NBPA, thus implying that Hunter was trying to conceal the fact that he had retained a law firm that employed his daughter.
>
> Claiming that the gift given to him by Hunter on behalf of the NBPA at the close of Fishers first term as NBPA President was intended to ensure his loyalty to Hunter during the upcoming collective bargaining negotiations.
>
> Stating at a press conference that Hunter had divided, misled, and misinformed the Union and players and propounded threats and lies against the Union.

The first three statements were made to the internal investigators. The protection afforded these statements under the SLAPP statute has been discussed above. Likewise statements at a press conference are clearly protected under both subdivsion (e)(3) and (e)(4).

Probability of Plaintiff Prevailing on his Defamation Claims

The elements of a defamation claim are:

1. Intentional publication by defendant;
2. of statement of fact;

3. that is false;
4. defamatory;
5. unprivileged; and
6. has a natural tendency to injure or that causes special damages.

E.g., Taus v. Loftus (2007) 40 Cal.4th 683, 720. See also Palm Springs Tennis Club v. Rangel (1999) 73 Cal. App. 4th 1, 7 (pleading defamation per quod requires alleging that people had special knowledge of facts from which they could discern that statements were defamatory) and McGarry v. Univ. Of San Diego (2007) 154 Cal.App.4th 97, 112 (statements that charge directly without a need for explanation are libelous per se. as to which pleading and proving special damages is not required).

First, Fisher complains that plaintiff has not recited the exact word Fisher allegedly said. As noted in Jacobsen v. Schwarzenegger, 357 F.Supp.2d 1198, 1216 (C.D.Cal. 2004):

> Under California law, although a plaintiff need not plead the allegedly defamatory statement verbatim, the allegedly defamatory statement must be specifically identified, and the plaintiff must plead the substance of the statement. See Okun v. Superior Court, 29 Cal.3d 442, 458, 175 Cal.Rptr. 157, 629 P.2d 1369 (1981) (citations omitted), cert. denied, 454 U.S. 1099, 102 S.Ct. 673, 70 L.Ed.2d 641 (1981); Kahn v. Bower, 232 Cal.App.3d 1599, 1612 n. 5, 284 Cal.Rptr. 244, 252 (1991); Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F.Supp. 1303, 1314 (N.D.Cal.1997).

Further, as explained in Okun v. Superior Court (1981) 29 Cal.3d 442, 458:

> Defendants contend the allegation of slander is fatally inexact as to time and place of utterance and persons addressed. Yet the pleading does seem certain enough in those respects. Less particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense. (Bradley v. Hartford Acc. & Indem. Co. (1973) 30 Cal.App.3d 818, 825, 106 Cal.Rptr. 718; Schessler v. Keck (1954) 125 Cal.App.2d 827, 835, 271 P.2d 588 (upholding pleading on information and belief).) Nor is the allegation defective for failure to state the exact words of the alleged slander. Notwithstanding an early dictum cited here (Haub v. Friermuth (1905) 1 Cal.App. 556, 557, 82 P. 571), we conclude that slander can be charged by alleging the substance of the defamatory statement. (See Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal.2d 224, 235, 11 Cal.Rptr. 97, 359 P.2d 465; Schessler v. Keck, supra, 125 Cal.App.2d 827,

830, 271 P.2d 588 (sustaining allegation of statement that "plaintiff was being treated for syphilis ... and ... should not be employed as a cook"); cf. des Granges v. Crall (1915) 27 Cal.App. 313, 315, 149 P. 777 (requiring exact pleading of words of libel).)

In this case, the statements are adequately specific. The court also rejects the defendant's argument that the statements did not expressly refer to Hunter.

The first statement is alleged to have occurred on April 15, 2012. The complaint was filed May 16, 2013 and as such is barred by the one year statute of limitations as set forth in CCP § 340.

A statement regarding a public figure has the added element of malice. This court concludes that for purposes of defamation, the evidence shows Hunter is a public figure as previously discussed. See McGarry v. Univ. Of San Diego (2007) 154 Cal.App.4th 97, 113-14 (public figure (one of pervasive fame or notoriety) must show statements were with knowledge of falsity or with reckless disregard of that, and limited public figure (one voluntarily injected, or drawn into, a public controversy for a limited range of issues) must show the same to the extent the communication relates to the figure's role in a public controversy); Khawar v. Globe Internat. (1998) 19 Cal. 4th 254, 263, 265 (involuntary limited public figure must have purposefully engaged in activity inviting criticism, or have acquired substantial media access in relation to the controversy); Gallagher v. Connell (2004) 123 Cal. App. 4th 1260, 1272 ("Gertz, suggested there may be a third type of public figure—the involuntary public figure—although it noted 'the instances of truly involuntary public figures must be exceedingly rare.'"); Annette F. v. Sharon S. (2004) 119 Cal. App. 4th 1146, 1164 ("possible to become a public figure by being drawn into a particular 'public controversy' without purposeful action ... 'for an individual who ... has acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements.'"); Gilbert v. Sykes (2007) 147 Cal. App. 4th 13, 25 ("A person becomes a limited purpose public figure by injecting himself into the public debate about a topic that concerns a substantial number of people."); Ampex Corp. v. Cargle (2005) 128 Cal. App. 4th 1569, 1577 ("The limited purpose public figure is an individual who voluntarily injects him or herself or is drawn into a specific public controversy, thereby becoming a public figure on a limited range of issues."); Denney v. Lawrence (1994) 22 Cal. App. 4th 927, 934 ("'limited" purpose public figures, are persons who have either voluntarily injected themselves into a particular public controversy, or who have been drawn into such controversies."); Rudnick v. McMillan (1994) 25 Cal. App. 4th 1183, 1190 (public-figure determination is question of law); Christian Research Institute v. Alnor (2007) 148 Cal. App. 4th 71, 88, 90 (gross negligence is not actual malice, but instead defendants must have had knowledge of falsity or doubt of the truth, and failures to

investigate must be purposeful avoidance of truth or of knowledge of facts which could confirm probable falsity);

Malice is not simply ill will or spite. Annetter F. v.Sharon F., supra at 1167.

The court does not find any evidence of malice as the term is used in the defamation context.

Further, as to the second statement, Fisher did not make a statement of fact regarding Hunter. He is only alleged to have stated that he was unaware that Hunter's daughter was employed by the prominent Washington D. C.- based law firm that Hunter retained to represent the NBPA. Whether or not Fisher did actually know the circumstances of Hunter's daughter's employment, there is no evidence that Fisher attempted to imply that Hunter was trying to conceal the fact that he had retained a law firm that employed his daughter or that anyone understood this statement to be defamatory.

Likewise, Hunter has not established that the third statement was defamatory. Indeed, the evidence shows that Fisher stated that Fisher felt uncomfortable with a gift Hunter had given him. There is no evidence that Fisher stated or implied the gift was a bribe. Stating that an expensive gift made the giftee uncomfortable because the giftee felt obligated to the gifter is a far cry from stating that a gift was an illegal or immoral bribe. This is a statement of opinion rather than fact as it expressed Fisher's own feeling about the gift.

Finally, as to the forth statement, the court has read the statement as attached to the Kassof Decl. at Exhibit 10. The only mention of Mr. Hunter was a truthful statement that Hunter had been terminated. Fisher also states that going forward "we" (meaning the Union players leadership, "will no longer be divided, misled, misinformed." In context, the statement does not appear to be of and concerning Hunter. See Vogel v. Felice (2005) 127 Cal. App. 4th 1006, 1023-24. Second, the statement makes a prediction about the future. Third, in context the statement can be viewed as one of opinion:

> In drawing the distinction between opinion and fact " 'California courts have developed a "totality of the circumstances" test ....' [Citation.] The court must put itself in the place of an ' " 'average reader' " ' and decide the ' " 'natural and probable effect' " ' of the statement. [Citations.] The words themselves must be examined to see if they have a defamatory meaning, or if the ' " 'sense and meaning ... fairly presumed to have been conveyed to those who read it' " ' have a defamatory meaning. [Citations.] Statements ' " cautiously phrased in terms of

> apparency" ' are more likely to be opinions. [Citations.] [¶] In addition to the language, the context of a statement must be examined. [Citation.] The court must 'look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.' [Citation.]" (Hofmann Co. v. E.I. Du Pont de Nemours & Co. (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384].)
>
> Where, as here, the comments are made in the arena of public debate and controversy, a reviewing court has an obligation to examine the whole record in order to ensure that there is no infringement of the First Amendment guarantee of free expression. (Moyer, supra, 225 Cal.App.3d 720, 724; *579 Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 17 [111 L.Ed.2d 1, 16-17, 110 S.Ct. 2695].)
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> * * *
>
> "Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion."

Campanelli v. Regents of University of California (1996) 44 Cal.App.4th 572, 578 -579.

Fisher was announcing Hunter's termination. The public at that point was aware of the difficulties and differing opinions in the Union leadership. There was no statement that "Hunter misled or misinformed us." Instead, in the context the statements were made, the court must view them as statements of Mr. Fisher's opinion.

Motion to Lift Discovery Stay

On noticed motion and for good cause, the court may order that specified discovery be conducted in spite of the statutory stay. C.C.P. 425.16(g); see Robertson v. Rodriguez (1995) 36 Cal.App.4th 347, 357, (plaintiff was not denied right to engage in meaningful discovery; he had already deposed relevant witnesses before defendant moved to strike and he did not file noticed motion to conduct additional discovery); Evans v. Unkow (1995) 38 Cal.App.4th 1490, 1499, (plaintiff's discovery request, made when he moved for reconsideration of action's dismissal, was untimely and not supported by good cause); Sipple v. Foundation for Nat. Progress (1999) 71 Cal.App.4th 226, 247(plaintiff's discovery request was denied; further discovery could not result in disclosure of information permitting plaintiff to demonstrate prima facie case on any of his claims, and extensive discovery requested would subvert intent of anti-SLAPP legislation); Tuchscher Dev.

Enterprises v. San Diego Unified Port Dist. (2003) 106 Cal.App.4th 1219, 1247, (to conduct discovery in spite of statutory stay imposed after motion to strike is made, both timely noticed motion and showing of good cause must be made); 1-800 Contacts v. Steinberg (2003) 107 Cal.App.4th 568, 593 (following Sipple; discovery was properly denied where plaintiff failed to show what additional facts plaintiff expected to discover and plaintiff also sought to take defendant's deposition to prepare for motion for preliminary injunction); Garment Workers Center v. Superior Court (2004) 117 Cal.App.4th 1156, 1162(trial court erred in ordering limited discovery against defendants in libel action on issue of actual malice before hearing on anti-SLAPP motion); Tutor-Saliba Corp. v. Herrera (2006) 136 Cal.App.4th 604, 618 (trial court did not err in denying plaintiff's request for discovery to prove elements of prima facie claim of defamation; prima facie case was conceded by defendant, and claim that discovery was needed to explore factual basis for defendant's defense of privilege came too late.)

Here, the motion is moot as to NBPA. Regarding the claims as to Fisher and Wior, for the most part the SLAPP motion was granted for legal reasons or failure to plead the allegations to state a claim, and not because of a failure of facts. The one area where the court found a lack of evidence was whether Fisher negotiated secretly with the owners. However, the misrepresentation claims were struck based upon that reason and upon legal reasons as set forth in the ruling.

The court finds no good cause is shown and accordingly, denies the motion.