ANDREW A. KASSOF, P.C. (*Pro Hac Vice*)
MARTIN L. ROTH (*Pro Hac Vice* pending)
DIANA M. WATRAL (*Pro Hac Vice*)
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654
Telephone: 312-862-2000
Facsimile: 312-862-2200
andrew.kassof@kirkland.com
martin.roth@kirkland.com
diana.watral@kirkland.com

Attorney for Defendants
DEREK FISHER and JAMIE WIOR

LYNNE C. HERMLE (STATE BAR NO. 99779)
JOSEPH C. LIBURT (STATE BAR NO. 155507)
CHRISTINA SARCHIO (*Pro Hac Vice*)
ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
Menlo Park, California 94025
Telephone: 650-614-7400
Facsimile: 650-614-7401
lchermle@orrick.com
jliburt@orrick.com
csarchio@orrick.com

Attorneys for Defendant
THE NATIONAL BASKETBALL PLAYERS ASSOCIATION

JAMES W. QUINN (*Pro Hac Vice*)
BRUCE S. MEYER (*Pro Hac Vice*)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: 212-310-8000
Facsimile: 212-310-8007
james.quinn@weil.com
bruce.meyer@weil.com

Attorneys for Defendant
THE NATIONAL BASKETBALL PLAYERS ASSOCIATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

G. WILLIAM HUNTER,

Plaintiff,

v.

DEREK FISHER, as President of the Executive Committee of the National Basketball Players Association and in his individual capacity, JAMIE WIOR, THE NATIONAL BASKETBALL PLAYERS ASSOCIATION, a Delaware corporation, and DOES 1 THROUGH 10, inclusive,

Defendants.

Case No. RG 13679736

Assigned For All Purposes To:
Judge Frank Roesch

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR CHANGE OF VENUE

Action Filed: May 16, 2013

Date: August 15, 2013
Time: 3:45 pm
Dept.: 24
Judge: Hon. Frank Roesch

Plaintiff's venue argument is frivolous. Plaintiff relies on a legally-invalid, long-expired, and superseded contract instead of the only alleged agreement on which he claims lost income. That is not—and has never been—the law in California. He then abandons the venue allegations in the complaint (*see* Compl. ¶ 15), and ignores Fisher and Wior's right to try the tort claims where they live in Los Angeles. In the process, plaintiff disregards California law establishing a defendant's right to transfer the entire case if *any single claim* should be transferred. This rule carries particular force here where one of the individual defendants, Wior, is not even named on any of the breach-of-contract counts, and the other, Fisher, has a right to transfer *all* of the nine non-contract claims asserted against him. Put simply, the venue issue before the Court is bell clear. Settled California law requires a transfer of this case to Los Angeles County.

First, plaintiff does not dispute the general rule that defendants have an "ancient and valuable right" to defend a lawsuit in their home county. *Goossen v. Clifton*, 75 Cal. App. 2d 44, 47-48 (1946). Instead, plaintiff argues that an exception applies because he signed just the first of his four alleged contracts in Alameda County. In other words, ignoring the venue rules under the only alleged contract on which he can claim unpaid income, plaintiff points instead to the location where he signed a much earlier contract that expired by its own terms *sixteen* years ago (after full performance) and was canceled and expressly superseded by later alleged contracts *multiple times*. California law rejected this type of argument more than 60 years ago: where "there is a new contract pleaded in the complaint, the court may not, for venue purposes, look to the old contract." *Crofts & Anderson v. Johnson*, 101 Cal. App. 2d 418, 422 (1950); *see also Tringali v. Vest*, 106 Cal. App. 2d 720, 723 (1951) (same); *Stute v. Burinda,* 123 Cal. App. 3d Supp. 11, 14-15 (1981) (rejecting the argument that "the venue or proper court resolution cannot be based on subsequent amendments to the original contract or on subsequent contracts"). Plaintiff cannot cite a single case determining venue by where the parties signed an outdated, extinguished and superseded contract. For a good reason—that is not the law in California or anywhere else. *Id.*

Indeed, the old contract has no legal significance at all. The original contract had a three-year term that expressly expired in July 1999. (Pl. Opp., Hunter Decl. Ex. 1) When the parties completed and fully performed that contract, they entered into a new one. (Compl. Ex. B) Then, in

2005, the NBPA and plaintiff replaced that second contract a year before it ended with one that ran through 2011. (Compl. Ex. C) Finally, in 2011, as plaintiff himself contends, he executed a fourth alleged agreement—which was never approved as the NBPA Bylaws required—and the NBPA terminated plaintiff's employment in 2013. (Compl. Ex. D, ¶ 96) Each alleged contract contained an "ENTIRE AGREEMENT" provision that expressly canceled and superseded any prior agreements between the parties:

> **This Agreement** (including all exhibits, schedules and documents contemplated herein) **contains the entire understanding of the parties** hereto relating to the subject matter hereof **and supersedes all prior** and contemporaneous negotiations, **agreements** and understandings, **written or oral, between the parties.** There are no other representations or warranties between the parties and all reliance with respect to representations is solely upon the representations and agreements contained in this Agreement.

(Compl. Ex. B, ¶ 12; Compl. Ex. C, ¶ 12; Compl. Ex. D, ¶ 12) (emphasis added)

California enforces these "entire agreement" provisions as written. *E.g., Grey v. Am. Mgmt. Serv.*, 204 Cal. App. 4th 803, 807-08 (2012) (new contract with an "entire agreement" clause superseded prior contract); *Brinton v. Bankers Pension Servs., Inc.*, 76 Cal. App. 4th 550, 560 (1999) ("A written contract's terms cannot be 'explained or supplemented by evidence of consistent additional terms' if 'the writing is intended . . . as a complete and exclusive statement of the terms of the agreement.'" (quoting Code Civ. Proc., § 1856, subd. (b))). The Court cannot excise the "superseding" language at plaintiff's behest. *See, e.g., Series AGI W. Linn of Appian Grp. Investors DE LLC v. Eves*, 217 Cal. App. 4th 156, 164 (2013) ("It is widely recognized that the courts are not at liberty to revise an agreement . . . . Neither abstract justice nor the rule of liberal interpretation justifies the creation of a contract for the parties which they did not make themselves."). The contract on which plaintiff now relies was expressly superseded and extinguished as a matter of law. This is not something plaintiff can plead around. (*Compare* Pl. Opp. at 2 ("the allegations of the Complaint must be taken as true on a motion for change of venue") *with Crofts*, 101 Cal. App. 2d at 422; *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 967 (1992) ("The court does not, however, assume the truth of contentions, deductions or conclusions of law."); *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120, 125 (1990) (same); *Walker v. City and Cty. of San Francisco*, 97 Cal. App. 2d

901, 907 (1950) ("mere conclusions" of law, unlike allegations of fact, need not be taken as true on a motion such as a demurrer)).

Try as he might, plaintiff cannot minimize the effect of each contract's "entire agreement" provision by labeling the alleged 2011 contract a mere "extension." While never approved under the Bylaws, that alleged agreement was a fully integrated, self-titled "CONTRACT OF EMPLOYMENT," and did not reference or incorporate any earlier contract. (Compl. Ex. D) Instead, the alleged agreement replaced every provision of the contract it purported to follow so it could stand on its own (*see id.* ¶¶ 1-15), while expressly "superseding" all prior contracts between the parties. (*Id.* ¶ 12)

Labels aside, plaintiff's new theory does not help him anyway. Plaintiff argues that he is seeking damages under both the 1996 "Employment Contract ***and*** 2010 Extension." (Pl. Opp. at 6 (emphasis added)) Under these circumstances, the case still should be transferred because, as plaintiff does not dispute, the so-called "extension" agreement would support the transfer. *Goossen*, 75 Cal. App. 2d at 49-50 ("[T]he test is whether on any one of the causes of action the defendant is entitled to a change to the county of his residence. If there is one such cause, then defendant is entitled to the change no matter how many other causes may be set forth in which he is not entitled to the change."); *Int'l Inv. Co. v. Chagnon*, 170 Cal. App. 2d 441, 443 (1959) (affirming transfer from San Francisco County even though an express written contract was signed in San Francisco where an oral contract was not entered there); *Tringali*, 106 Cal. App. 2d at 723 (reversing denial of venue motion where second count of two-count complaint required resort to new contract that arose in San Francisco and superseded original contract made in Monterey where plaintiff filed action).

In fact, the Court need only look to plaintiff's complaint to see through his new desperate argument. The complaint never even alleged this new venue theory. (*See* Compl. ¶ 15) Paragraph 15 detailed the alleged bases for venue in this Court, and said absolutely nothing about where he signed the long-extinguished original contract:

> Venue is proper in this Court pursuant to California Code of Civil Procedure Section 395(a), in that Fisher's and the NBPA's obligations under the employment contract between Hunter and those Defendants were to be performed in Alameda County, California, where the NBA Golden State Warriors are based and where Hunter regularly performed his responsibilities as Executive Director, and the injury to

> Hunter from Defendants' wrongful acts and/or negligence occurred in Alameda County, California.

(*Id.*) Plaintiff's new argument—based on an old, superseded contract—cannot stave off the required transfer to the individual defendants' home county. *See Hayutin v. Rudnick*, 115 Cal. App. 2d 138, 141 (1952) (disregarding venue argument raised in briefing but not in complaint: "The complaint did not allege where the agreement was to be performed nor where it was entered into. The right to a change of place of trial must be determined from the pleadings of record at the time the motion for a change is filed. A pleader is required to frame his complaint so as to clearly show his right to retain the cause in the county in which the action is commenced, and all doubts and ambiguities must be resolved in favor of a defendant's right to have the cause tried in the county of his residence.").

In short, the contract on which plaintiff relies was long-expired, extinguished and superseded. In contrast, the alleged agreement on which plaintiff claims lost income was signed in Las Vegas, not Alameda County. As such, it cannot trump each individual defendant's "ancient and valuable" right to transfer this case to their home forum, *see* Cal. Civ. Pro. § 395(a); *Goossen*, 75 Cal. App. 2d at 47-48—and plaintiff does not (and cannot) argue otherwise.

Second, and wholly apart from the contract issue, plaintiff's Opposition does not address an *independent* and irrefutable basis for transfer: Los Angeles County is the *only* proper venue for the non-contract claims asserted against Fisher and Wior. Plaintiff's response is entirely silent on this point. Yet "where all the defendants in an action are non-residents of the county in which the action is brought, any of the defendants residing in another county are entitled to a change of the place of trial" unless the plaintiff can affirmatively prove that his claims fall within a statutory exception. (Defs. Opening Br. at 3 (citing *Lundington Exploration Co. v. La Fortuna Gold & Silver Min. Co.*, 4 Cal. App. 369, 370 (1906)). Plaintiff does not even argue that the non-contract claims against Fisher and Wior fit within any statutory exception. *See Kermit Ellsworth Johnson v. Superior Ct. of Fresno Cty.*, 232 Cal. App. 2d 212, 218 (1965) ("[A]n action based upon injury to person or personal property which is not a physical injury, such as libel, malicious prosecution, and false imprisonment, is triable solely at the defendant's residence."); Defs. Opening Br. at 4 (citing cases). Thus, defendants have a right to transfer those claims to Los Angeles County, where Fisher and Wior live.

Plaintiff does not respond to this argument—because he has no answer for it. And "[i]n such a case as this when an individual, a non-corporate defendant establishes his right to transfer as to one count, his motion should be granted irrespective of what showing he makes concerning other counts of the complaint." *Pacific Bal Indus. v. N. Timber, Inc.*, 118 Cal. App. 2d 815, 825 (1953). That is, when "the defendant is entitled to a change of venue of any one of the causes of action alleged in the complaint, the motion must be granted as to all." *Archer v. Superior Ct. of Humboldt Cty.*, 202 Cal. App. 2d 417, 419 (1962); *Mitchell v. Superior Ct. of L.A. Cty,* 186 Cal. App. 3d 1040, 1046 (1986) ("A defendant entitled to a change of venue as to one count in a multiple count complaint is entitled to the change as to the entire action.") (citation omitted). Accordingly, *all* of the claims must be transferred to Los Angeles County even if plaintiff could somehow establish proper venue in Alameda County on his contract claims. *See, e.g., Capp Care, Inc. v. Superior Ct. of L.A. Cty.*, 195 Cal. App. 3d 504, 508-09 (1987) (transferring entire case where nine causes of action could have been brought in original court, but where tenth cause of action was only proper in new venue).

Ignoring this case law, plaintiff relies instead on *Brown v. Superior Ct. of Alameda Cty.*, 37 Cal. 3d 477 (1984), which involved a different, inapplicable statute. (Pl. Opp. at 7-8) *Brown* cannot save this case from a transfer. The plaintiff in *Brown* brought claims sounding in tort and the California Fair Employment and Housing Act (FEHA). FEHA has a unique venue provision to maximize the ability of victims of discrimination, who "often lack financial resources," to pursue their claims. *Brown*, 37 Cal. 3d at 486. *Brown* determined that the "important public policies" underlying FEHA outweighed the defendant's right to transfer the case to the county where he resided. *Id.* at 488. That is nothing like the situation here. This case involves basic contract and tort claims, and is precisely the type of case without a "strong countervailing policy" where California courts routinely refuse to extend *Brown* to trump an individual defendant's statutory right to transfer the case to her home forum. *E.g., Gallin v. Superior Ct. of San Diego Cty.*, 230 Cal. App. 3d 541, 545-46 (1991) (*Brown*'s "policy exception" did not prevent transfer to defendants' county of residence); *Capp Care, Inc. v. Superior Ct.*, 195 Cal. App. 3d 504, 509 n.5 (1987) (same).

In sum, by bringing a single case against multiple defendants, plaintiff cannot "impair the right or thwart the exercise of the right of an individual defendant to remove the cause to the county

of his residence." *Pacific Bal*, 118 Cal. App. 2d at 828. Under settled venue rules, the whole case must be transferred to Los Angeles County, where Fisher and Wior reside.

Finally, plaintiff sets up a straw man suggesting defendants are trying to recuse "the entire Alameda County Superior Court bench" based on plaintiff's e-mail communications with Presiding Judge Clay about the issues in this case and defendant Fisher. (Pl. Opp. at 9) Defendants never argued that. Contrary to the inflammatory characterization, defendants never suggested that this Court cannot be impartial or that Judge Clay's e-mails were improper communications. Instead, defendants simply noted their reasonable (and palpable) concern that the e-mail exchange would create an unfortunate cloud over the perceived fairness of these proceedings. Under the circumstances, where the statute and case law already clearly require a transfer, the e-mail exchange serves as an additional reason why this case belongs in Los Angeles, where it should have been filed in the first place. That was and remains defendants' only point.

CONCLUSION

The venue rules at issue are absolutely clear: the two individual defendants have an "ancient and valuable right" to transfer this case to their home county. Plaintiff's Opposition only confirms—and, indeed, underscores—the need to transfer this case to Los Angeles County.

Dated: August 8, 2013

ANDREW A. KASSOF, P.C.
MARTIN L. ROTH
DIANA M. WATRAL
Kirkland & Ellis LLP

By: _____
ANDREW A. KASSOF, P.C.

Attorneys for Defendants
DEREK FISHER and JAMIE WIOR

Dated: August 8, 2013

LYNNE C. HERMLE
JOSEPH C. LIBURT
CHRISTINA SARCHIO
Orrick, Herrington & Sutcliffe LLP

JAMES W. QUINN
BRUCE S. MEYER
Weil, Gotshal & Manges LLP

By: _____
JOSEPH C. LIBURT

Attorneys for Defendant
THE NATIONAL BASKETBALL PLAYERS ASSOCIATION