DAVID L. ANDERSON (SBN 149604)
dlanderson@sidley.com
MARIE L. FIALA (SBN 79676)
mfiala@sidley.com
JOSHUA HILL (SBN 250842)
jhill@sidley.com
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, California 94104
Telephone: (415) 772-1200
Facsimile: (415) 772-7400

Attorneys for Plaintiff
G. WILLIAM HUNTER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

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. LC100771 **PLAINTIFF'S CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' ANTI-SLAPP MOTIONS** Date: December 6, 2013 Time: 8:30 a.m. Dept.: D Judge: Hon. Huey P. Cotton Complaint Filed: May 16, 2013

TABLE OF CONTENTS

Page

I. SUMMARY OF ARGUMENT 1

II. BACKGROUND 2

A. The Employment Contract Between Hunter and the NBPA 2

B. Hunter's Service to the NBPA 3

C. Fisher Undermines Hunter's Role as Executive Director 4

D. Fisher and Wior's Campaign to Oust Hunter 5

E. Fisher Lies to the Union's Lawyers 6

F. The Wrongful Termination and Breach of Hunter's Employment Contract 6

III. ARGUMENT 7

A. Hunter's Contract Claims (#1-4) Are Not Meritless SLAPP Claims. 7

1. The Union's Internal Investigation Is Not an "Official Proceeding." 8

2. The Contract Claims "Arise from" the NBPA's Termination of Hunter's Employment Contract, Not from Defendants' First Amendment Rights. 10

B. Hunter's Breach of Contract Claims Are Supported by Ample Evidence 11

1. Defendants Breached the Employment Contract and 2010 Extension (Claim One). 12

2. Defendants Breached an Implied-in-Fact Contract (Claim Two). 18

3. Defendants Breached Hunter's Contract by Repudiation (Claim Three). 19

4. Defendants Breached the Implied Covenant of Good Faith and Fair Dealing (Claim Four). 19

C. Hunter's Defamation Claims Are Not Subject to the Anti-SLAPP Statute. 20

1. Hunter's Defamation Claims Do Not Arise From Protected Activity. 20

2. Hunter's Defamation Claims Are Supported by Sufficient Evidence. 22

D. Hunter's Tortious Interference and Fraud Claims Are Not Barred by the Anti-SLAPP Statute. 27

1. The Tortious Interference and Fraud Claims Do Not Arise From Protected Activity. 27

2. The Tortious Interference Claims Are Well Supported by Evidence. 27

3. The Fraud Claims Are Also Supported by Sufficient Evidence. 29

4. Fisher's and Wior's Conduct Harmed Hunter. 30

E. If the Court Finds Hunter's Prima Facie Showing Deficient in Any Particular Respect, the Court Should Order Discovery for Good Cause Shown. 30

IV. CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Aitken v. Stewart,
129 Cal. App. 38 (1933) 15

Albanese v. Menounos,
218 Cal. App. 4th 923 (2013) 20, 21, 22

Avery v. Integrated Healthcare Holdings, Inc.,
218 Cal. App. 4th 50 (2013) 19

Baker v. Los Angeles Herald Examiner,
42 Cal. 3d 254 (1986) 24

Bergman v. Drum,
129 Cal. App. 4th 11 (2005) 13

Berry v. Maywood Mut. W. Co. No. One,
13 Cal. 2d 185 (1939) 15

Black v. Harrison Home Co.,
155 Cal. 121 (1909) 16

Blatty v. New York Times Co.,
42 Cal. 3d 1033 (1986) 24

Burrill v. Nair,
217 Cal. App. 4th 357 (2013) 11

Capital Med. Sys. Inc. v. Fuji Med. Sys., U.S.A. Inc.,
239 A.D.2d 743 (N.Y. App. Div. 1997) 18

Central Valley General Hosp. v. Smith,
162 Cal. App. 4th 501 (2008) 19

Christian Research Inst. v. Alnor,
148 Cal. App. 4th 71 (2007) 23

City of Cotati v. Cashman,
29 Cal. 4th 69 (2002) 7, 10

Commonwealth Energy Corp. v. Investor Data Exchange, Inc.,
110 Cal. App. 4th 26 (2003) 20, 21, 27

Cooper v. Anderson-Stokes, Inc.,
571 A.2d 786, 1990 WL 17756 (Del. 1990) 16

Copp v. Paxton,
45 Cal. App. 4th 829 (1996) 22, 23, 26

Cuenca v. Safeway San Francisco Employees Fed. Credit Union,
180 Cal. App. 3d 985 (1986) 9

Durell v. Sharp Healthcare,
183 Cal. App. 4th 1350 (2010) 12

Dyer v. Childress,
147 Cal. App. 4th 1273 (2007) 21

Episcopal Church Cases,
45 Cal. 4th 467 (2009) 1, 10, 11

Equilon Enter., LLC v. Consumer Cause, Inc.,
29 Cal. 4th 53 (2002) 7

Fletcher v. San Jose Mercury News,
216 Cal. App. 3d 172 (1989) 27

Franklin v. Dynamic Details, Inc.,
116 Cal. App. 4th 375 (2004) 24

Genger v. TR Investors, LLC,
26 A.3d 180 (Del. 2011) 15

Gilbert v. Sykes,
147 Cal. App. 4th 13 (2007) 26

Goldston v. Bandwidth Technology Corp.,
859 N.Y.S.2d 651 (N.Y. App. Div. 2008) 13

Greka Integrated, Inc. v. Lowrey,
133 Cal. App. 4th 1572 (2006) 11

Grummet v. Fresno Glazed Cement Pipe Co.,
181 Cal. 509 (1919) 12, 13

Hawran v. Hixson,
209 Cal. App. 4th 256 (2012) 25

Hutchinson v. Proxmire,
443 U.S. 111 (1979).....21

In re American Historical Ass'n,
49 F. Supp. 2d 274 (S.D.N.Y. 1999).....9

Kahn v. Bower,
232 Cal. App. 3d 1599 (1991) 24

Khawar v. Globe Internat., Inc.,
19 Cal. 4th 254 (1998) 22

Kibler v. N. Inyo Cnty. Local Hosp. Dist.,
39 Cal. 4th 192 (2006) 8

Linder v. Thrifty Oil Co.,
23 Cal. 4th 429 (2000) 11

Mann v. Quality Old Time Service, Inc.,
120 Cal. App. 4th 90 (2004) 11, 25

McConnell v. Innovative Artists Talent and Literary Agency, Inc.,
175 Cal. App. 4th 169 (2009) 10

Molko v. Holy Spirit Ass'n,
46 Cal. 3d 1092 (1988) 17

Moore v. Phillips,
176 Cal. App. 2d 702 (1959) 13

Moyer v. Amador Valley J. Union High Sch. Dist.,
225 Cal. App. 3d 720 (1990) 22

Nesson v. N. Inyo Cnty. Local Hosp. Dist.,
204 Cal. App. 4th 65 (2012) 8

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 22, 26

New York Univ. v. Cont'l Ins. Co.,
87 N.Y.2d 308 (N.Y. 1995) 17

Nguyen-Lam v. Cao,
171 Cal. App. 4th 858 (2009) 27

Noel v. River Hills Wilsons, Inc.,
113 Cal. App. 4th 1363 (2003) 25

Oasis West Realty, LLC v. Goldman,
51 Cal. 4th 811 (2011) 11, 22

Olaes v. Nationwide Mut. Ins. Co.,
135 Cal. App. 4th 1501 (2006) 1, 9

People ex rel. Fire Insurance Exchange v. Anapol,
211 Cal. App. 4th 809 (2012) 10

People v. Avery,
27 Cal. 4th 49 (2002) 17

People v. Blacksher,
52 Cal. 4th 769 (2011) 29

People v. Whitney,
121 Cal. App. 2d 515 (1953) 17

Preis v. Am. Indem. Co.,
220 Cal. App. 3d 752 (1990) 14

Reeves v. Hanlon,
33 Cal. 4th 1140 (2004) 28

Regalia v. Nethercutt Collection,
172 Cal. App. 4th 361 (2009) 23

Retired Employees Assn. of Orange County, Inc. v. County of Orange,
52 Cal. 4th 1171 (2011) 18

Ringler Assoc. Inc. v. Maryland Cas. Co.,
80 Cal. App. 4th 1165 (2000) 23

Rivero v. Am. Fed'n of State, County and Municipal Employees, AFL-CIO, et al.,
105 Cal. App. 4th 913 (2003) 21

Roe v. Doe,
2009 WL 1883752 (N.D. Cal. June 30, 2009) 22

Rusheen v. Cohen,
37 Cal. 4th 1048 (2006) 7

Schoolcraft v. Ross,
81 Cal. App. 3d 75 (1978) 20

Soukup v. Law Offices of Herbert Hafif,
39 Cal. 4th 260 (2006) 1, 11, 14

Southeastern Penn. Transp. Auth. v. Volgenau,
2012 WL 4038509 (Del. Ch. Aug. 31, 2012) 15

Stewart v. Rolling Stone LLC,
181 Cal. App. 4th 664 (2010) 26

Tanforan v. Tanforan,
173 Cal. 270 (1916) 11

Taylor v. Johnston,
15 Cal. 3d 130 (1975) 19

TPG Architecture LLP v. Biopartners at Lake Success, Inc.,
2010 N.Y. Misc. LEXIS 1731 (N.Y. Sup. Ct. Apr. 8, 2010) 15

Vergos v. McNeal,
146 Cal. App. 4th 1387 (2007) 8, 9

Weinberg v. Feisel,
110 Cal. App. 4th 1122 (2003) 21

Weisner v. 791 Park Avenue Corporation,
6 N.Y.2d 426 (N.Y. 1959) 16

Wong v. Jing,
189 Cal. App. 4th 1354 (2010) 22

Yates v. National Home for Disabled Volunteer Soldiers,
103 U.S. 674 (1880) 16

Young v. CBS Broad., Inc.,
212 Cal. App. 4th 551 (2012) 23

STATUTES

8 Del. C. § 124 15

29 U.S.C. § 431(a)(5)(H) 9

Cal. Civ. Proc. Code § 1621 18

Cal. Civ. Proc. Code § 46(1) 23

Cal. Civ. Proc. Code § 47(c) 1, 25

Cal. Civ. Proc. Code § 425.16 ..... *passim*

Cal. Corp. Code § 208 15

Fed. R. Crim. P. 6(e) 9

N.Y. CLS Bus. Corp. § 203. 15

I. SUMMARY OF ARGUMENT[1]

The anti-SLAPP statute protects against sham lawsuits brought to chill the valid exercise of certain constitutional rights. *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 278 (2006). To grant an anti-SLAPP motion, the Court must find that the lawsuit arises from such rights and is meritless. No court has made such findings on a record like the one now before this Court.

First, defendants ask the Court to find that their firing of Hunter is protected by the First Amendment because it was motivated by their own internal investigation, which they claim is tantamount to an "official proceeding" that is constitutionally protected by the anti-SLAPP statute. Of the many problems with this defense argument, the most obvious problem is that the cases on which defendants rely all involved statutorily mandated proceedings that were subject to judicial review. In contrast, the NBPA's investigation was conducted by its own lawyers as they saw fit. There was no judicial review. The courts have repeatedly rejected the defense argument that a private investigation is a constitutionally protected "official proceeding" under the anti-SLAPP statute. *See, e.g., Olaes v. Nationwide Mut. Ins. Co.*, 135 Cal. App. 4th 1501, 1508 (2006).

Second, defendants' argument misapprehends the gravamen of Hunter's contract claims. Hunter's contract claims do not arise from the internal investigation or any statements defendants made in connection with that investigation or to the press; they arise from defendants' failure to pay him. *Episcopal Church Cases*, 45 Cal. 4th 467, 477-78 (2009). Defendants do not have a First Amendment right to breach their contract.

Third, defendant Fisher asks this Court to find that his defamatory statements against Hunter are common-interest privileged under Cal. Civ. Proc. Code § 47(c). This defense argument ignores the fact that defendants published those defamatory statements on the Internet and in press outlets throughout the country, thereby waiving whatever privilege claims they now wish to assert. Other defense arguments about the tort claims, such as Fisher's argument that he did not identify Hunter

[1] Plaintiff G. William "Billy" Hunter ("Hunter") submits this consolidated opposition to the separate anti-SLAPP motions filed by defendants National Basketball Players Association ("NBPA" or the "union") and defendants Derek Fisher ("Fisher") and Jamie Wior ("Wior"). Hunter incorporates herein each of his arguments made in response to defendants' demurrers to the Complaint.

explicitly by name when he defamed him at an NBPA press conference, are also meritless. If Fisher thought that the law allowed such defamation by cleverness, he was wrong.

Defendants also ask the Court to find that this lawsuit is meritless, and to make this finding without any discovery whatsoever. However, despite the lack of discovery, Hunter has made an extensive evidentiary showing, including the declarations of three former members of the NBPA's governing Executive Committee and his own extensive declaration with supporting exhibits. This evidence shows that Hunter was wrongfully terminated and suffered other wrongs as set forth in the Complaint. Under the anti-SLAPP statute, the Court credits this evidence at this stage of the proceedings. This lawsuit is not a sham.

It seems obvious that defendants did not file their motions to protect their constitutional rights, which are not implicated by this lawsuit, but instead to secure an automatic discovery stay during the pendency of their motions. The Court should deny defendants' anti-SLAPP motions. If the Court has any reservation about any aspect of those motions, the Court should order discovery, as contemplated by the anti-SLAPP statute for good cause shown and as set forth in Hunter's accompanying discovery motion.

II. BACKGROUND

A. The Employment Contract Between Hunter and the NBPA

In July 1996, Hunter and the NBPA entered into a written contract (the "Employment Contract") hiring Hunter as the NBPA's Executive Director for a three-year term. Hunter Decl. ¶ 2 & Ex. 1.[2] The parties extended Hunter's term of employment by agreements signed in 1999, 2005, and 2010 ("2010 Extension"). *Id*. ¶¶ 3-6 & Exs. 2-4.

The NBPA is governed by its Constitution and By-Laws and two bodies, the Executive Committee, comprised of the union's officers, and a Board of Player Representatives ("Board"), comprised of one representative from each team. *Id*. Ex. 7 at 3-8. The Employment Contract and three extensions were each signed by the then-President of the NBPA and approved by the Executive Committee. *Id*. ¶¶ 2-6 & Exs. 1-4. The 2010 Extension, which Fisher signed and in which he

[2] "Hunter Decl." refers to the Declaration of G. William Hunter in Support of Plaintiff's Opposition to Defendants' Anti-SLAPP Motions filed herewith.

warranted he had authority to bind the NBPA to its terms, was unanimously approved by the Executive Committee. *Id*. ¶ 6 & Ex. 4 § 11; Evans Decl. ¶ 4; Ratliff Decl. ¶ 5; Thomas Decl. ¶ 4.[3] The 2010 Extension continued Hunter's term to June 30, 2015 and gave Hunter the option, exercisable at his discretion, to extend the term for another year. Hunter Decl. Ex. 4 § 1. Hunter has given written notice of his intention to exercise the option. *Id*. ¶ 84 & Ex. 20.

The 2010 Extension contains two termination provisions. Hunter Decl. Ex. 4 § 6. The NBPA may terminate Hunter *for cause*, in which event it must pay his compensation for the remainder of the contract year.[4] *Id.* Or the NBPA may terminate Hunter *without cause* provided it pays his annual salary and benefits for the remainder of the entire contract term. *Id*. at § 6(a).

B. Hunter's Service to the NBPA

During his 17 years as NBPA Executive Director, Hunter created a legacy of financial prosperity for the NBPA and its members. Hunter Decl. ¶¶ 17-20, 22. When he assumed the leadership of the NBPA, the union was $5 million in debt and plagued by apathy and infighting among the players and union leadership. *Id*. ¶¶ 14, 18. Hunter stabilized the union's finances – its assets now exceed $100 million, and it owns its office building in Manhattan. National Basketball Association ("NBA") players are now the highest paid team athletes in the world. *Id*. ¶¶ 17-19. Hunter was recognized for his diligence, professionalism, and transparency. *See id*. ¶ 16. He instituted programs to prepare players for life after basketball. *Id*. ¶ 20. Most importantly, Hunter was dedicated to strengthening the "middle class" of players and ensuring that revenue was fairly distributed rather than concentrated in the hands of a few superstars. *Id*. ¶¶ 15, 24; Ratliff Decl. ¶ 4; Thomas Decl. ¶ 8.

---

[3] Remarkably, members of the NBPA's Executive Committee, the union's governing body, who personally witnessed the events described in the Complaint have submitted declarations that support Hunter's allegations. *See* Declaration of Maurice Evans in Support of Plaintiff's Opposition to Defendants' Anti-SLAPP Motions ("Evans Decl."), Declaration of Theophalus Ratliff in Support of Plaintiff's Opposition to Defendants' Anti-SLAPP Motions ("Ratliff Decl."), Declaration of Etan Thomas in Support of Plaintiff's Opposition to Defendants' Anti-SLAPP Motions ("Thomas Decl.").

[4] "For cause" termination is defined as "embezzlement, theft, larceny, material fraud or other acts of dishonesty," "failure to perform the duties of his position … within thirty (30) days of written notice from the [NBPA] to take specific corrective action," or "conviction of, or entrance of a plea of guilty or *nolo contendere* to, a felony or other crime." *Id*.

C. Fisher Undermines Hunter's Role as Executive Director

Hunter guided the union through three collective bargaining agreement ("CBA") negotiations with the NBA. Hunter Decl. ¶ 25. In 2011, the parties were negotiating a new CBA to replace the one expiring on June 30, 2011. Hunter Decl. ¶¶ 27-28. Fisher was a member of the negotiating team, but under the By-Laws, Hunter had exclusive authority to conduct the negotiations. *Id*. ¶¶ 23, 38 & Ex. 7 at 10. A key issue that divided the parties concerned the split of basketball-related income ("BRI"). *Id*. ¶ 28; Evans Decl. ¶ 7. The owners were offering the players a share of BRI at or below 50%. Hunter believed it was in the players' best interests to seek a share of BRI well in excess of 50% and, in all events, to hold firm at 52%. Hunter Decl. ¶ 31. The parties were unable to reach an agreement on a new CBA by the summer of 2011. On July 1, 2011, the NBA owners locked out the players, delaying the start of the 2011 season. *Id*. ¶ 28; Evans Decl. ¶ 6.

Hunter also believed that all NBPA representatives were unified in this high-stakes negotiation. Hunter Decl. ¶¶ 32-33; Ratliff Decl. ¶ 7. He was wrong. Late in the evening before a scheduled October 28, 2011 negotiation session, Hunter received a call from a player who identified himself as the "Black Mamba." Hunter Decl. ¶ 34. He knew the caller was superstar Kobe Bryant, the highest paid NBA player. *Id*. Hunter also knew that Bryant and Fisher were friends and former teammates and shared the same agent, Robert Pelinka. *Id*.; Evans Decl. ¶ 12. Pelinka, whom Hunter knew, was also on the phone. Hunter Decl. ¶ 34. Although Bryant had publicly supported the union's negotiating position, he told Hunter during this call to agree to a 50-50 deal, adding "I know that tomorrow is a big day. You can put this thing to bed. Do the deal," and "I got your back." *Id.* Hunter understood that a 50-50 deal had already been struck behind his back. *Id.*

The following morning, Hunter confronted Fisher and asked whether he had been secretly negotiating with the owners. *Id.* ¶ 36. Former Executive Committee member Maurice Evans witnessed the confrontation. Evans Decl. ¶ 11. Fisher denied the truth, both to Hunter and Evans and later in the media. Hunter Decl. ¶¶ 36-37; Evans Decl. ¶ 11. Fisher denied having a role in the secret negotiations and claimed that it was Bryant and Pelinka who had engaged in them, adding that Bryant and Pelinka had "thrown [Fisher] under the bus." Hunter Decl. ¶ 36. Tellingly, Hunter had not, to this point in the conversation, mentioned the call from Bryant and Pelinka. *Id.* Despite his

self-serving denials, Fisher's reaction was inconsistent with someone who was innocent of the charge. Evans Decl. ¶ 11. Almost immediately, Fisher, who had previously been very active in the negotiations, stopped participating. Ratliff Decl. ¶ 12. In Evans's words, Fisher seemed "stunned and shocked" to have been exposed. Evans Decl. ¶ 13. The owners' behavior also changed significantly; while they previously had directed frequent questions to Fisher, after the confrontation they did not address him at all. *Id.* ¶ 14. They also appeared less confident and more accommodating than they had been before. Ratliff Decl. ¶ 13. The union and NBA agreed on the terms of a new CBA in November 2011. Hunter Decl. ¶ 41.

D. Fisher and Wior's Campaign to Oust Hunter

After the confrontation with Hunter, Evans and Ratliff both observed that Fisher became increasingly hostile towards Hunter. Ratliff Decl. ¶ 12; Evans Decl. ¶¶ 17, 23-24, 32, 34. Fisher told Evans that Hunter "was losing it" just as Hunter signed the new CBA with better terms than Fisher had sought in his unauthorized, secret negotiations (Evans Decl. ¶ 17), and Thomas observed that Fisher seemed to have a "personal vendetta" against Hunter (Thomas Decl. ¶ 14). Fisher disengaged from the Executive Committee, withdrew from participating in the NBPA's affairs and, with the support and assistance of his publicist and business manager Jamie Wior, launched a campaign to depose Hunter as Executive Director. Hunter Decl. ¶¶ 38, 53-56, 59; Ratliff Decl. ¶ 12; Evans Decl. ¶ 13. Wior was not employed by the NBPA and had no legitimate role in the union's affairs. Ratliff Decl. ¶ 10; Cummings Decl. ¶ 5. Yet, Fisher involved Wior in every aspect of his union activities. Evans Decl. ¶¶ 9-10; Hunter Decl. ¶ 46. As just one example, on September 15, 2011, the union held a players-only regional meeting at the Vdara Hotel in Las Vegas. Wior showed up, insisted on being allowed into the meeting, and refused to leave when asked by NBPA security officers. Fisher overruled the NBPA security officers and allowed her to stay. Evans Decl. ¶ 10; Hunter Decl. ¶ 48; Cummings Decl. ¶ 6. Wior inserted herself into the decisions to terminate certain employees. Cummings Decl. ¶ 13; Hunter Decl. ¶ 49. Wior was closely involved in the drafting all of Fisher's public statements and micromanaged his appearances. Evans Decl. ¶ 9; Hunter Decl. ¶ 50. On a number of occasions, Fisher, after meeting with Wior, issued public statements and messages to players purporting to be on behalf of the NBPA even when it was not

appropriate for him to do so and even though his communications had not been approved by the NBPA. Evans Decl. ¶ 9; Hunter Decl. ¶ 51.

In April 2012, after months of inattention to union matters, Fisher falsely accused Hunter of criminal conduct and attempted, without Executive Committee approval, to retain lawyers to investigate Hunter. Evans Decl. ¶¶ 23, 25; Hunter Decl. ¶¶ 54, 56. This led the Executive Committee to request Fisher's resignation, as they explained in a detailed statement to the Board. Fisher, determined to oust Hunter, ignored the calls for his resignation. Evans Decl. ¶ 22 & Ex. 1; Hunter Decl. ¶ 58. Not long after, the first in a series of news articles appeared repeating Fisher's false accusations and questioning Hunter's job performance. Hunter Decl. ¶ 59.

E. Fisher Lies to the Union's Lawyers

After the negative publicity generated by these news articles, the union in late April 2012 retained the Paul Weiss law firm to review the union's business practices. Hunter Decl. ¶ 60. When interviewed by Paul Weiss, Fisher falsely told the interviewers that Hunter had concealed the fact that he retained the law firm that employed Hunter's daughter to represent the union. *Id*. ¶ 63. Hunter had not concealed this information; it was well-known that his children were employed by, or were affiliated with, the NBPA. *Id*.; Ratliff Decl. ¶ 15. Fisher also told the interviewers that Hunter tried to bribe Fisher by giving him an expensive watch some two-and-a-half years earlier. Hunter Decl. ¶ 64. All members of the Executive Committee had been given a watch, in keeping with the NBPA's longstanding tradition of gift-giving that was well known to Fisher. *Id*.; Ratliff Decl. ¶ 17. Indeed, at times, Fisher was responsible for distributing watches to members of the Executive Committee, as shown in the photograph filed herewith. Hunter Decl. ¶ 65 & Exs. 15, 16. The Paul Weiss lawyers summarized their findings in a report that the NBPA publicly posted on the Internet.

F. The Wrongful Termination and Breach of Hunter's Employment Contract

On February 17, 2013, Fisher and other members of the Executive Committee wrote to Hunter terminating his employment with the NBPA, effective immediately. Hunter Decl. ¶ 69 & Ex. 17 (the "Termination Letter"). Although members of the Executive Committee who approved the 2010 Extension consider it valid and enforceable, the Termination Letter asserts that the 2010 Extension "is null, void, invalid, and unenforceable" because it "was not properly negotiated,

executed, or approved." *Compare* Evans Decl. ¶¶ 4 *and* Ratliff Decl. ¶¶ 5-6, 8 *with* Hunter Decl. Ex. 17. The letter further states that, in the event the 2010 Extension is enforceable, "this letter shall be construed as notice of a 'for cause' termination," but does not specify any grounds for the purported termination. Hunter Decl. Ex. 17. The NBPA has not paid Hunter the compensation and benefits owed under either of the contractual termination provisions. *Id*. ¶ 85.

III. ARGUMENT

For defendants to prevail on their anti-SLAPP motions, the Court must find that Hunter's claims arise from constitutionally protected activity and that his claims are meritless. *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006).[5] Defendants bear the burden of proving that Hunter's claims arise from constitutionally protected activity, while Hunter bears the burden of proving that he has a reasonable probability of prevailing on the merits of his claims. *City of Cotati v. Cashman*, 29 Cal. 4th 69, 76 (2002); *Equilon Enter., LLC v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002); Cal. Civ. Proc. Code § 425.16(b)(1). Unless Hunter's claims both arise from protected activity and are meritless, defendants' anti-SLAPP motions must be denied. If the merits showing cannot be made at this stage of the proceedings because defendants control needed discovery, then the Court should order discovery for good cause shown. CCP § 425.16(g).

A. Hunter's Contract Claims (#1-4) Are Not Meritless SLAPP Claims.

The 2010 Extension required the NBPA to pay Hunter whether he was terminated with or without cause. Hunter Decl. Ex. 4 § 6. If he was terminated with cause, the NBPA agreed to pay Hunter for the remainder of the contract year, an amount in excess of $1 million. *Id.* If he was terminated without cause, the NBPA agreed to pay Hunter for the remainder of the contract life, an amount in excess of $10 million. *Id.* The job security conferred by these payment provisions was

[5] CCP § 425.16(e) specifies four areas of protected activity: (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; (4) or 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.

important to both Hunter and the union, because to do his job representing all of the NBA's players, Hunter needed to stand up to the owners, the superstar players, and the superstar agents.

When the NBPA terminated Hunter, it paid him nothing. Hunter Decl. ¶ 84 & Exs. 22, 23. Although the NBPA claimed that the termination was for cause, the NBPA did not specify the cause. Hunter Decl. Ex. 17. Because even a for-cause termination could not justify complete nonpayment, the NBPA also claimed that Hunter's employment contract did not exist, although Hunter had performed (and been paid) under it and its predecessors for 17 years. *Id.*

In its anti-SLAPP motion, the NBPA now argues that its conduct is immunized from judicial review because it is protected by the First Amendment. The NBPA argues that the anti-SLAPP statute applies because it was motivated to fire Hunter by an internal investigation conducted in response to a grand jury subpoena and a labor code section, and because the firing decision was motivated by Fisher's and Wior's statements about Hunter. NBPA Br. 8-12. This argument fails for two reasons. First, an internal investigation conducted by the NBPA's own attorneys is not an "official proceeding authorized by law" under the anti-SLAPP statute. Second, Hunter's breach of contract claims do not arise from that investigation or any statements made by defendants; they arise from the NBPA's wrongful termination of his employment contract.

1. The Union's Internal Investigation Is Not an "Official Proceeding."

Although defendants make much of the Paul Weiss internal investigation that preceded Hunter's termination, NBPA Br. 8-9, 11-12, they cannot establish that the investigation was an "official proceeding[] authorized by law." CCP § 425.16(e)(1),(2). Significantly, the NBPA's internal investigation was not conducted pursuant to any statutorily mandated procedure; the NBPA's own lawyers conducted the investigation as they saw fit. *See* Hunter Decl. ¶ 61. It is also significant that the NBPA's investigation was not subject to judicial review. These facts serve to distinguish this case from those on which the NBPA relies for its "official proceeding" argument.[6]

[6] The NBPA relies on *Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 39 Cal. 4th 192, 198, 200 (2006), and *Nesson v. N. Inyo Cnty. Local Hosp. Dist.*, 204 Cal. App. 4th 65 (2012), but both these cases involved physician suspensions arising from statutorily mandated peer review procedures subject to judicial review. Similarly, in *Vergos v. McNeal*, 146 Cal. App. 4th 1387, 1396 (2007), the grievance procedure established by the University of California Regents was an "official proceeding authorized by law" because the Regents' "policies and procedures have the force and effect of statute."

The courts have repeatedly rejected the argument that internal investigations conducted by private employers are "official proceedings" that confer anti-SLAPP protection. In *Olaes v. Nationwide Mut. Ins. Co.*, 135 Cal. App. 4th 1501, 1508 (2006), the defendant insurance company claimed that statements made during an internal investigation of suspected sexual harassment were made in connection with an anti-SLAPP "official proceeding" because the employer was required by law to prevent sexual harassment. The court rejected this defense argument. In *Cuenca v. Safeway San Francisco Employees Fed. Credit Union*, 180 Cal. App. 3d 985 (1986), the defendant credit union argued that an internal investigation by a supervisory committee was an "official proceeding" because credit unions are highly regulated and federal statutes empower credit union supervisory committees to make annual audits and suspend officers. The court rejected this defense argument.

In this case, the NBPA argues that it was required to investigate because it received a grand jury subpoena and because it has an obligation under 29 U.S.C. § 431(a)(5)(H) to file reports with regard to the discipline or removal of officers or agents. There is no meaningful difference between the NBPA's argument and those rejected in *Olaes* and *Cuenca*. Whatever the purpose or motivation of a private employer's internal investigation, such an investigation is not an "official proceeding" because it is not a procedure mandated by law and subject to judicial review. *See also Vergos*, 146 Cal. App. 4th at 1396 n.8 (distinguishing between private and statutorily mandated procedures).[7]

[7] Although the NBPA insists that the termination arose out of the Paul Weiss investigation and attempts (albeit unpersuasively) to claim it is an "official proceeding," at other times the NBPA seems to claim that the grand jury subpoena is the "official proceeding." *See* NBPA Br. 8. Neither variation of this argument helps the NBPA because Hunter's contract claims arise from the NBPA's failure to pay Hunter, not from the NBPA's motives or general context. *See infra* pp. 10-11. In addition, neither the subpoena nor any other admissible evidence regarding the grand jury subpoena is in the Court's record. It is predictable that the NBPA will claim that the grand jury subpoena is secret, but the NBPA is under no confidentiality obligation with regard to the grand jury subpoena. Fed. R. Crim. P. 6(e) ("No obligation of secrecy may be imposed on any person except [the grand jurors, interpreters, court reporters, or law enforcement]."). If the NBPA wanted to, it could introduce competent evidence about the subpoena. *In re American Historical Ass'n*, 49 F. Supp. 2d 274, 283 (S.D.N.Y. 1999) (noting that Rule 6 does not "provide for complete secrecy" and that any "grand jury witness may disclose publicly anything that occurred"). At its essence, the NBPA's argument is that this Court must defer, sight unseen, to the NBPA's characterization of a grand jury subpoena that the NBPA has chosen to withhold from the record.

2. The Contract Claims "Arise from" the NBPA's Termination of Hunter's Employment Contract, Not from Defendants' First Amendment Rights.

There is another separate, independent reason to deny defendants' motion: Hunter's contract claims do not "arise from" the union's internal investigation or the grand jury subpoena that the NBPA claims was the motivation for it. Nor do they "arise from" any statements made by defendants either to the press or during the course of the investigation. Hunter's contract claims arise from the NBPA's failure to comply with the terms of Hunter's employment contract.

"Determining whether a cause of action arises from protected speech or petitioning activity requires a focus on the principal thrust or gravamen of the cause of action." *People ex rel. Fire Insurance Exchange v. Anapol*, 211 Cal. App. 4th 809, 823 (2012). The thrust of Hunter's contract claims is that the NBPA fired him without paying him. These claims do not implicate First Amendment activity. *See McConnell v. Innovative Artists Talent and Literary Agency, Inc.*, 175 Cal. App. 4th 169, 180 (2009) ("no one would suggest that a statement or writing firing an employee is protected First Amendment activity").

Nonetheless, in its anti-SLAPP motion, the NBPA argues that Hunter's termination was motivated by the internal investigation and therefore arose from it. The courts, however, have rejected this defense "motive" argument. Indeed, "courts must be careful to distinguish allegations of conduct in which liability is to be based from allegations of motives for such conduct. Causes of action do not arise from motives; they arise from acts." *People ex rel. Fire Insurance Exchange*, 211 Cal. App. 4th at 823. In determining whether a cause of action is a meritless SLAPP claim, "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." *Cotati*, 29 Cal. 4th at 78.

The California Supreme Court drew this distinction between act and motive in rejecting an anti-SLAPP motion in the *Episcopal Church Cases*, 45 Cal. 4th 467 (2009). In the *Episcopal Church Cases*, a local parish disaffiliated itself from the national church after the national church ordained a gay minister. *Id.* at 477. Thereafter, the national church sued the local parish to recover the church buildings. The Supreme Court held that the dispute "arguably may have been 'triggered' by protected activity," but the underlying motivation did not "transform a property dispute into a

SLAPP suit." *Id.* at 477-78. Likewise in this case, Hunter's contract claims are not "transformed" into meritless SLAPP claims just because the NBPA argues that it was motivated by an internal investigation that it characterizes as an "official proceeding"[8] or because the NBPA adorned its breach of the contract with false statements about Hunter's performance.[9]

B. Hunter's Breach of Contract Claims Are Supported by Ample Evidence.

Even if Hunter's contract claims intruded on defendants' constitutional rights, defendants' motion to strike would still fail because each of Hunter's claims is supported by a prima facie showing of sufficient facts.[10] With regard to the merits showing, Hunter need only demonstrate that his claims meet a "minimum level of legal sufficiency and triability." *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 438 (2000). At this stage of the proceedings, the Court does not "weigh credibility [nor] compare the weight of the evidence. Rather, [it] accept[s] as true the evidence favorable to the plaintiff and evaluate[s] the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *Soukup*, 39 Cal. 4th at 269 n.3. Moreover, where a claim is based on multiple acts of alleged misconduct (e.g., where a defamation claim is based on multiple defamatory statements), the plaintiff need only show a probability of prevailing on one of those acts. Once the plaintiff does so, he "has established that [his] cause of action has some merit and the entire cause of action stands." *Oasis West Realty, LLC v. Goldman*, 51 Cal. 4th 811, 820 (2011) (quoting *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90, 106 (2004)); *see also Burrill v. Nair*, 217 Cal. App. 4th 357, 379-82 (2013) (same).

---

[8] The case on which the NBPA relies, *Greka Integrated, Inc. v. Lowrey*, 133 Cal. App. 4th 1572 (2006), does not help its position. In *Greka*, the act that gave rise to the plaintiff's cause of action for breach of a nondisclosure agreement was the disclosure of information in response to the subpoena. In this case, the act that gave rise to Hunter's contract claims was Hunter's termination, not anything the NBPA did in response to the grand jury subpoena.

[9] In addition, defendants' defamation of Hunter is not constitutionally protected anyway as Hunter's performance was not a matter of public interest until defendants' defamation. *See infra* pp. 20-22.

[10] Hunter pled these four claims in the alternative, as he is entitled to do under California law. *See Tanforan v. Tanforan*, 173 Cal. 270, 273 (1916). So long as an alternatively pled claim is supported by a prima facie showing of sufficient facts, it cannot be stricken under the anti-SLAPP statute. *See* CCP § 425.16(b).

1. Defendants Breached the Employment Contract and 2010 Extension (Claim One).

"A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1367 (2010) (citations omitted). Hunter has made a prima facie showing on each element.

a. Hunter and the NBPA Formed an Express Contract.

In July 1996, Hunter and the NBPA entered into the written Employment Contract appointing Hunter as the NBPA's Executive Director for an initial three-year term with an additional optional renewal term. Hunter Decl. ¶ 2 & Ex. 1 §§ 1, 3. The NBPA and Hunter later extended Hunter's employment term under the Employment Contract by three agreements, including the 2010 Extension. *Id*. ¶¶ 3-6 & Exs. 2-4. The Employment Contract and the three extensions were each signed by the then-President of the NBPA and approved by the Executive Committee. *Id*. ¶¶ 3-6 & Exs. 1-4. Consistent with the union's previous practice, the 2010 Extension was signed by Derek Fisher, as NBPA President, and unanimously approved by the NBPA's Executive Committee. *Id*. ¶ 6 & Ex. 4; Evans Decl. ¶ 4; Ratliff Decl. ¶ 5. Pursuant to the Employment Contract, as extended, Hunter served as the NBPA's Executive Director for 17 years, during which the NBPA paid him according to the terms of the Contract, and Hunter performed all the responsibilities of his position. Hunter Decl. ¶¶ 2, 11. This evidence is sufficient to make the minimal prima facie showing that a contract exists. *See, e.g., Grummet v. Fresno Glazed Cement Pipe Co.*, 181 Cal. 509, 513 (1919).

Defendants argue that Hunter cannot make a prima facie showing on his breach of contract claims because the 2010 Extension was not approved by the Board. This argument is both unavailing on an anti-SLAPP motion and incorrect. In factual circumstances very similar to those here, the California Supreme Court held that where an employment agreement was signed by the corporation's president, the corporation's claim that the contract had not been authorized by the board of directors was an affirmative defense that could not be considered in determining whether the plaintiff made out a prima facie case. *Grummet*, 181 Cal. at 514-13 ("It is clear that it did not rest upon the plaintiff to show a special authorization of its board of directors, or that the president

acted upon the advice of the board, in order to make out a prima facie case").[11] Rather, where, as here, an employee performed services and received compensation under a contract signed by the corporation's president, "it is to be presumed that the president and manager of the defendant corporation acted within the scope of his authority when he made the contract of employment."[12] *Id*.

(i) Fisher expressly represented he had authority to bind the union to the Employment Contract.

By designating Fisher as the signor on the 2010 Extension, the NBPA and Fisher expressly represented that Fisher had authority to bind the NBPA. Hunter Decl. Ex. 4 § 11 ("Each person signing below on behalf of the Association represents and warrants that he has the authority to sign on behalf of the Association, and to bind the Association to the terms set forth herein."). Executive officers, like Fisher, have the authority to conduct an entity's affairs, including by entering into binding contracts. *See, e.g., Moore v. Phillips*, 176 Cal. App. 2d 702, 709 (1959) ("[A] corporation can act only through its agents, and in its ordinary course of business its president, as corporate representative, may execute contracts to bind the corporation."); *Goldston v. Bandwidth Technology Corp.*, 859 N.Y.S.2d 651, 654 (N.Y. App. Div. 2008) ("The president . . . of a corporation has power, prima facie, to do any act which the directors could authorize or ratify"). This authority was explicit here, where the By-Laws expressly authorize the President to sign any contract other than a collective bargaining agreement, subject to the approval of the Executive Committee if over $25,000. Hunter Decl. Ex. 7 p. 18. (As noted above, the 2010 Extension was also approved by the Executive Committee.) Moreover, at the point Fisher signed the 2010 Extension, the NBPA President had signed two prior extensions on the NBPA's behalf without a vote by the Board, and

---

[11] Although the *Grummet* court addressed a motion for nonsuit, its analysis applies to a determination of whether a plaintiff has made a prima facie showing sufficient to survive an anti-SLAPP motion. *See Bergman v. Drum*, 129 Cal. App. 4th 11, 14 (2005) (prima facie case sufficient to survive anti-SLAPP challenge is similar to that required in nonsuit).

[12] The court made this presumption based on plaintiff's showing that he had been "engaged by the president and manager of the corporation; that he performed services for the corporation; that the employment continued for nearly two years; that plaintiff's name appeared as assistant manager in the advertising of the defendant corporation, and that the books of the corporation showed that he received a fixed compensation for his services . . . ." *Grummet*, 181 Cal. at 512. Hunter has made a similar showing here.

the union had done nothing to prevent its executive officers from continuing to take such action. *See, e.g.*, *Preis v. Am. Indem. Co.*, 220 Cal. App. 3d 752, 761 (1990) ("[W]here the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability."). Hunter has made a prima facie showing that Fisher had the authority – whether actual or ostensible – to bind the NBPA to the 2010 Extension.

(ii) Hunter reasonably believed Fisher's representation of authority.

Defendants cannot avoid their contractual responsibilities by asserting that Hunter was on notice of the By-Laws and thus on notice that Fisher lacked the authority to bind the NBPA to the 2010 Extension. NBPA Dem. Br. 4.[13] Contrary to that assertion, the By-Laws do *not* "unambiguously" require that each Employment Contract extension be approved by a supermajority of the Board. *Id*. Rather, the by-law provision on which defendants rely addresses only the *appointment* of an Executive Director and was reasonably understood by Hunter to require Board approval only upon such appointment and not each time his employment contract was extended.[14] Hunter Decl. ¶¶ 8-9, Ex. 7 p. 9. When the union extended Hunter's contract in 2010, no member of the NBPA Executive Committee nor anyone else affiliated with the union communicated to Hunter that the Extensions required approval by a Board vote. *Id*. ¶ 9. Thus, it was entirely reasonable for Hunter to believe that Fisher accurately represented that he had the authority to enter into the 2010 Extension on behalf of the NBPA.[15] That is sufficient to establish ostensible authority and require

[13] Defendants argue that because the Complaint cites the By-Laws and because Hunter received an email in 2011, *after the 2010 Extension was signed*, that somehow means Hunter knew that the 2010 Extension needed to be approved by a supermajority of the Board. NBPA Dem. Br. 4. This is illogical. As explained above, Hunter did not believe the 2010 Extension required additional approvals to be valid and enforceable. Not only have defendants failed to offer any evidence to the contrary, even if they had, it would not be appropriate to weigh that evidence against Hunter's at this stage in the litigation. *See Soukup*, 39 Cal. 4th at 269 n.3.

[14] The provision at issue reads: "The Executive Director shall be appointed by the Board of Player Representatives and the Executive Committee of the Players Association. The appointment of an 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." Hunter Decl. Ex. 7 p. 9.

[15] Moreover, even if Fisher somehow lacked authority to bind the union at the time the 2010 Extension was signed, that would not negate the union's subsequent ratification of the contract.

the NBPA to uphold its part of the bargain.

(iii) Defendants ratified the Employment Contract and are estopped to deny its enforceability.

Even if Fisher did not have authority to bind the NBPA at the time he signed the 2010 Extension, defendants accepted and paid for Hunter's performance under that contract without objection. Hunter Decl. ¶ 11. Having done so, they are estopped to deny the enforceability of that agreement years later. *Berry v. Maywood Mut. W. Co. No. One*, 13 Cal. 2d 185, 190 (1939) ("[W]hen the corporation with knowledge of the contract accepts performance and makes payments on account thereof, there is a ratification of the contract, or an estoppel to deny its validity.").[16]

(iv) Defendants' argument that the Employment Contract was automatically void is wrong on the law.

Finally, defendants' argument that the Employment Contract is automatically void because it did not comply with the By-Laws is wrong as a legal matter. Under Delaware law (the NBPA is a Delaware corporation), "[a] challenge to the validity of an action or to the corporation's capacity to undertake that action [that] seeks to make the action void" is not permitted except in three limited circumstances, none of which apply here. *Southeastern Penn. Transp. Auth. v. Volgenau*, 2012 WL 4038509, at *3 (Del. Ch. Aug. 31, 2012) (noting that the purpose of 8 Del. C. § 124 is "to prevent both corporations and those contracting with them from avoiding contracts that could be classified as 'outside the scope of . . . [corporation's] authorized powers'"). California and New York have similar statutes. Cal. Corp. Code § 208, N.Y. CLS Bus. Corp. § 203; s*ee also Aitken v. Stewart*, 129 Cal. App. 38, 42 (1933) ("it is the policy of the law and the endeavor of the courts to hold corporations, as well as natural persons, to their contracts and make them liable for the obligations they have incurred") (citation omitted).

---

[16] *See also TPG Architecture LLP v. Biopartners at Lake Success, Inc.*, 2010 N.Y. Misc. LEXIS 1731, *4-5 (N.Y. Sup. Ct. Apr. 8, 2010) ("Ratification of a contract can occur, as here, through intentionally accepting benefits under the contract by remaining silent or acquiescing for a period of time after the opportunity to avoid it has arisen, by acting/performing under the contract, or affirmatively acknowledging the contract"); *Genger v. TR Investors, LLC*, 26 A.3d 180, 195 (Del. 2011) (ratification "is an equitable defense that precludes a party who has accepted the benefits of a transaction from thereafter attacking it.") (citations and internal quotations omitted).

The cases that the NBPA cites do not support its sweeping assertion that any contract that is not approved per an organization's bylaws is necessarily without force and effect. NBPA Dem. Br. 3-4. Indeed, in *Black v. Harrison Home Co.*, 155 Cal. 121 (1909), the court recognized that a corporation may be bound by an officer acting with apparent, even if not actual, authority or where the corporation ratifies a contract entered into by an officer in excess of his authority. *Id*. at 130.[17] Here, the NBPA is bound by the 2010 Extension, both because Fisher had authority to bind the union when he signed it and because the NBPA subsequently accepted Hunter's performance with knowledge of the extension. Hunter has made a prima facie showing that an express contract exists.

b. Defendants Breached Their Contractual Obligations.

Hunter has also made a prima facie showing that defendants breached the Employment Contract and 2010 Extension when they terminated Hunter's employment without compensation. The contract permits the NBPA to terminate Hunter, either for cause or without cause, but requires the NBPA to compensate him in either case. In the event of a termination without cause, the 2010 Extension requires the union to pay Hunter his salary, benefits, and accrued vacation for the remaining term of the contract. Hunter Decl. Ex. 4 § 6. In the event of a termination for cause, the union must pay Hunter his salary, benefits, and accrued vacation for the remainder of the contract year. *Id.* The NBPA has not paid Hunter anything since it terminated his employment. *Id*. ¶ 84 & Exs. 22, 23. That fact alone establishes a prima facie showing of breach.

Defendants misdirect the inquiry by insisting that "Hunter was employed at-will" and that the 2010 Extension "contains at-will language." NBPA Br. 5-6. As demonstrated above, although the Employment Contract permitted the NBPA to terminate Hunter *without cause*, it did not permit the

---

[17] The agreement at issue in *Weisner v. 791 Park Avenue Corporation*, 6 N.Y.2d 426 (N.Y. 1959), made approval by a co-op board an express condition precedent. *Id*. at 431. There is no such condition precedent in the Employment Contract or the 2010 Extension. *Cooper v. Anderson-Stokes, Inc*., 571 A.2d 786, 1990 WL 17756 (Del. 1990), did not address whether lack of board approval would have rendered a contract unenforceable. *Id*. at *2. Rather, there was no contract in that case. *Id*. Finally, *Yates v. National Home for Disabled Volunteer Soldiers*, 103 U.S. 674, 675 (1880), similarly did not involve a failure to obtain board approval. That case held invalid a contract to pay an officer compensation in addition to his salary because the institution's by-laws expressly prohibited any officer from receiving, and the board from paying, compensation other than his salary. That is not the issue here.

NBPA to terminate him *without compensation*. Therefore the Court does not need to consider at this stage whether the NBPA had grounds to terminate Hunter for cause.

Nevertheless, Hunter has made a prima facie showing that the NBPA did not have cause to terminate his employment. Under the 2010 Extension, the NBPA may terminate Hunter "for cause" only in the event of his: "(i) embezzlement, theft, larceny, material fraud, or other acts of dishonesty; (ii) failure to perform the duties of his position . . . within [30] days of written notice . . . to take specific corrective action; [and] (iii) conviction of, or entrance of a plea of guilty or *nolo contendere* to a felony or other crime. . . ." Hunter Decl. Ex. 4 at § 6. None of these grounds exist here. Hunter categorically denies ever having committed any act of embezzlement, theft, larceny, material fraud, or dishonesty in connection with his position as Executive Director of the NBPA, and he has never been convicted of a crime or failed to take corrective action in response to a written request by the union. *Id.* at ¶ 71.

The NBPA also attempts to argue on the basis of inadmissible hearsay that it terminated Hunter because of hiring practices involving his children (Hermle Decl. Ex. A at 16-18), payout of accrued vacation time that Hunter received in 2009 (*id*. at 13), and failure to ratify the 2010 Extension (*id*. at 12).[18] Even if these assertions were supported by admissible evidence, they fail to meet the definition of "for cause" conduct under the 2010 Extension because none involve material fraud or dishonesty.[19] First, Hunter never concealed that his children worked at the union or that his children were employed by union vendors. Evans Decl. ¶ 31; Ratliff Decl. ¶ 18; Cummings Decl. ¶ 10. Moreover, these employment arrangements were well-known to the NBPA, and similar

[18] These assertions are based on inadmissible hearsay contained in the Paul Weiss report. Hunter disputes these allegations and submits *admissible* evidence from former members of the Executive Committee refuting them. Evans Decl. ¶¶ 2-3, 35; Ratliff Decl. ¶¶ 5, 8, 18; Thomas Decl. ¶ 15.

[19] Embezzlement requires Hunter to have had the specific intent to fraudulently appropriate the union's property. *People v. Whitney*, 121 Cal. App. 2d 515, 520-21 (1953). Theft and larceny require Hunter to have taken union property with the intent to deprive the union of it. *People v. Avery*, 27 Cal. 4th 49, 54 (2002). Material fraud or other acts of dishonesty require Hunter to have misrepresented a material fact with the intent to defraud and the union to have relied to its detriment on the misrepresentation. The elements of a fraud cause of action are representation of a material existing fact, falsity, scienter, deception and injury. *New York Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 318 (N.Y. 1995); *Molko v. Holy Spirit Ass'n*, 46 Cal. 3d 1092, 1108 (1988).

arrangements are common in professional basketball. Cummings Decl. ¶ 11. Second, Hunter's contract at the time he received a payout of accrued vacation time, the 2005 Extension, allowed him to accrue paid vacation days. Hunter Decl. ¶ 80 & Ex. 3 at § 4. Third, the union's claim that Hunter should have notified it that the 2010 Extension had not been ratified by a two-thirds vote of the Board is baseless. As demonstrated above, the 2010 Extension did not require such a vote, the union was aware that there had been no Board vote, and Hunter's purported "failure" to secure such a vote is certainly not material fraud or dishonesty even if he had some obligation to do so.

c. Hunter Substantially Performed His Duties and Was Harmed by Defendants' Breach.

Hunter performed all of his obligations under the Employment Contract and 2010 Extension. Hunter Decl. ¶¶ 11, 26; Ratliff Decl. ¶ 6; Evans Decl. ¶ 5. Hunter was harmed by defendants' breach because he has been denied payment of compensation and benefits owed to him under the 2010 Extension. Hunter Decl. ¶ 86.

2. Defendants Breached an Implied-in-Fact Contract (Claim Two).

Hunter also has presented evidence sufficient to make a prima facie showing of breach of an implied-in-fact contract, which claim is pleaded in the alternative. *See* Pl. Dem. Opp. at 8-9. An implied-in-fact contract is created when the parties' conduct "is intentional and each knows, or has reason to know, that the other party will interpret the conduct as an agreement to enter into a contract." CACI No. 305; s*ee also* Cal. Civ. Proc. Code § 1621 ("An implied contract is one, the existence and terms of which are manifested by conduct."). Even when a written contract exists, "[e]vidence derived from experience and practice can now trigger the incorporation of additional, implied terms. Implied contractual terms ordinarily stand on equal footing with express terms, provided that, as a general matter, implied terms should never be read to vary express terms." *Retired Employees Assn. of Orange County, Inc. v. County of Orange*, 52 Cal. 4th 1171, 1178-79 (2011); *see also Capital Med. Sys. Inc. v. Fuji Med. Sys., U.S.A. Inc.*, 239 A.D.2d 743, 745, (N.Y. App. Div. 1997) ("The business conduct of the parties following the expiration of the 1985 agreement, which continued in essentially the same manner as it had since the beginning of their relationship, is evidence of an implied-in-fact contract between them."). As described above, the

parties manifested their intent to extend the Employment Contract by entering into the 2010 Extension. *See supra* pp. 12-13. Thus, even if the 2010 Extension were invalid, there is sufficient evidence that the parties operated under an implied-in-fact contract containing the same terms, which defendants breached by terminating Hunter without the compensation which is his due.

Defendants assert that Hunter's implied-in-fact contract claim fails because they had "good cause" for termination. NBPA Br. 13-14. This ignores the fact that the implied-in-fact contract at issue has the *same terms as the 2010 Extension* – i.e., that the NBPA was required to compensate Hunter whether the termination was for or without cause. Thus, defendants' conduct in breach of the express contract necessarily breached the implied-in-fact contract. *See supra* pp. 16-18.

3. Defendants Breached Hunter's Contract by Repudiation (Claim Three).

The claim for breach of contract by repudiation is also pleaded in the alternative to the claim for breach of express contract. Pl. Dem. Opp. at 7. "Breach by repudiation is referred to in the case law as an anticipatory breach. As a matter of definition, an anticipatory breach of contract occurs when the contract is repudiated by the promisor before the promisor's performance under the contract is due." *Central Valley General Hosp. v. Smith*, 162 Cal. App. 4th 501, 514 (2008). Here, the NBPA expressly repudiated the Employment Contract and 2010 Extension when it sent the termination letter claiming that Hunter's contract was "null, void, invalid, and unenforceable." Hunter Decl. Ex. 17; *Taylor v. Johnston*, 15 Cal. 3d 130, 137 (1975) ("An express repudiation is a clear, positive, unequivocal refusal to perform."). The 2010 Extension gave Hunter an option to extend the contract for an additional period, exercisable at his sole discretion. Hunter Decl. Ex. 4 § 1. The NBPA's performance under the option provision was not yet due when it sent the termination letter. At the time of the repudiation, Hunter was fully capable of performing the role of Executive Director (Hunter Decl. ¶ 75), but the NBPA made clear that it would not meet the contract requirements. *Id*. This, coupled with the facts described above, constitutes a prima facie showing of a breach by repudiation.

4. Defendants Breached the Implied Covenant of Good Faith and Fair Dealing (Claim Four).

The implied covenant of good faith of fair dealing is read into every contract. *Avery v.*

Integrated Healthcare Holdings, Inc., 218 Cal. App. 4th 50, 61 (2013). It requires each party to do all things reasonably contemplated by the contract's terms to accomplish its goals, and to refrain from doing anything that would destroy or injure another party's right to receive the fruits of the contract. *See, e.g.*, *Schoolcraft v. Ross*, 81 Cal. App. 3d 75, 80 (1978) ("The implied covenant imposes upon each party the obligation to do everything that the contract presupposes they will do to accomplish its purpose."). The 2010 Extension clearly contemplated that it would be enforceable against both parties to the contract, and the implied covenant imposed a duty on the NBPA to do all things reasonably necessary to ensure its enforceability, including securing any necessary approvals. Even if the absence of Board approval for the 2010 Extension were to render the contract unenforceable, the covenant of good faith and fair dealing would place the responsibility for that failure squarely on the NBPA. In addition, Fisher's secret negotiations with the NBA owners during the 2011 CBA negotiations undermined Hunter's role as Executive Director and unfairly interfered with Hunter's right to receive the benefit of the 2010 Extension.

C. Hunter's Defamation Claims Are Not Subject to the Anti-SLAPP Statute.

1. Hunter's Defamation Claims Do Not Arise From Protected Activity.

Hunter alleges that Fisher is liable for defamation based on any one of four statements: **Statement 1**, claiming to be aware of conduct by Hunter that might be subject to, and might subject others to, criminal liability; **Statement 2**, claiming to have been unaware that Hunter's daughter was employed by the law firm that represented the NBPA, thus implying that Hunter was trying to conceal the fact that he had retained a law firm that employed his daughter; **Statement 3**, claiming that the gift Hunter gave Fisher on behalf of the NBPA at the close of Fisher's first term as NBPA President was intended to ensure his loyalty to Hunter during the upcoming CBA negotiations; and **Statement 4**, 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 anti-SLAPP statute applies to defamation claims only if the defamatory statements are made "in connection with a 'public issue' or an 'issue of public interest.'" *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.*, 110 Cal. App. 4th 26, 32 (2003); *see also Albanese v. Menounos*, 218 Cal. App. 4th 923 (2013) (describing public interest requirement). Fisher has not

carried his burden of showing that these statements concerned a matter of public interest before he *created* media interest in Hunter's job performance by slandering Hunter. "Those charged with alleged defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). Fisher concedes that the defamatory statements were "about Hunter's job performance," but attempts to focus the Court's attention on society's general interests in professional basketball at large, the NBA, and the CBA negotiations. Fisher & Wior Br. 4-5. The focus of the anti-SLAPP inquiry, however, is "the specific nature of the speech rather than the generalities that might be abstracted from it." *Commonwealth Energy*, 110 Cal. App. at 34. Although the NBA and CBA negotiations might be matters of public interest, "the fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not sufficient to meet the statutory requirements" of the anti-SLAPP law. *Dyer v. Childress*, 147 Cal. App. 4th 1273, 1280 (2007) (citation omitted). Rather, Fisher must demonstrate that Hunter's job performance, the actual topic of the defamatory statements, was already "a topic of widespread public interest" when he made those statements. Fisher & Wior Br. 4. He has not done so.

It is well-settled that a "person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1133-34 (2003); *see also Rivero v. Am. Fed'n of State, County and Municipal Employees, AFL-CIO, et al.*, 105 Cal. App. 4th 913, 926 (2003) (mere publication of information is insufficient to create a matter of public interest). Fisher presents no evidence of public interest in Hunter's job performance *before* his and Wior's smear campaign against Hunter. Instead, Fisher demonstrates that his smear campaign worked by inciting negative media attention and making Hunter's job performance the subject of media speculation. Of the 38 news articles that defendants submitted purporting to demonstrate public interest in Hunter's day-to-day operation of the NBPA, only five are dated before Fisher's first defamatory statement, and all five of those articles concern the NBA lockout and CBA negotiations, not Hunter's job performance. *See* Hermle Decl. Ex. E.

The *Albanese* case – decided after Fisher filed his anti-SLAPP motion – underscores the fatal defect in Fisher's argument. In *Albanese*, a celebrity stylist sued a television personality for defamation. Defendant moved to strike under the anti-SLAPP law, arguing that the defamatory

statements were protected activity because "any statement concerning a person in the public eye qualifies as 'speech in connection with a public issue or an issue of public interest.'" 218 Cal. App. 4th at 927. The court affirmed the denial of defendant's motion, holding that the public interest requirement requires evidence of a *pre-existing* public controversy concerning the subject of the defamatory statements. *Id.* at 937. ("[E]ven assuming that Albanese is a well known celebrity stylist . . . there is no evidence that she was involved in a public controversy or that her fame is so great that her involvement in this private dispute is a matter of public interest. We therefore conclude the public interest requirement . . . was not met in this case.").[20] The same is true here.

2. Hunter's Defamation Claims Are Supported by Sufficient Evidence.

Hunter's evidence (and all reasonable inferences that must be drawn in his favor) establish a probability of prevailing on all four of Fisher's defamatory statements – although, as noted above, Hunter need only establish liability on one statement to support his claims. *Oasis West Realty*, 51 Cal. 4th at 820. The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. *Wong v. Jing*, 189 Cal. App. 4th 1354, 1369 (2010); *see also* CACI 1700, *et seq.* A public figure suing for defamation must also show "actual" or "constitutional" malice, which is defined as knowledge of falsity or reckless disregard for the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Khawar v. Globe Internat., Inc.*, 19 Cal. 4th 254, 275 (1998).

a. Fisher Published Actionable Statements of Fact.

As a starting point, "[b]ecause [a defamatory] statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability." *Wong*, 189 Cal. App. 4th at 1370. Each of Fisher's statements, *see supra* p. 20, makes "factual imputation of specific dishonest conduct capable of being proved true or false" and thus is actionable. *Copp v. Paxton*, 45 Cal. App. 4th 829, 838 (1996); *see also Moyer v. Amador Valley J.*

---

[20] Fisher's reliance on *Roe v. Doe*, 2009 WL 1883752 (N.D. Cal. June 30, 2009) is misplaced. In *Roe*, unlike here, the defamatory statements were made in response to existing public interest in an ongoing controversy. *Id*. at *8 ("[T]he challenged statements made by Cuban *were prompted by the public's interest* in the dispute.") (emphasis added). By contrast, Fisher did not contribute to the public discussion of an ongoing public controversy – he created the controversy.

Union High Sch. Dist., 225 Cal. App. 3d 720, 724 (1990) (noting that statements of fact "imply a provably false factual assertion"). But even if these statements were considered opinions, "there is no wholesale defamation exemption for anything that might be labeled an opinion. If a statement of opinion implies a knowledge of facts which may lead to a defamatory conclusion, the implied facts must themselves be true." *Ringler Assoc. Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1181 (2000); *Copp*, 45 Cal. App. 4th at 837 (statement of opinion may still be actionable if it implies the allegation of undisclosed defamatory facts as the basis for the opinion).

To meet the publication element, Hunter need only demonstrate that these statements were made to another person, which he has done. Evans Decl. ¶¶ 23, 32; Hunter Decl. ¶¶ 65, 71 & Ex. 18.

b. Fisher Knowingly Made False and Defamatory Statements.

A defamation plaintiff need only show falsity by a preponderance of the evidence to overcome an anti-SLAPP motion. *Christian Research Inst. v. Alnor*, 148 Cal. App. 4th 71, 76 (2007). This burden of proof is "admittedly low," *Young v. CBS Broad., Inc.*, 212 Cal. App. 4th 551, 559 (2012), and is met here.

Statement 1 expressly referred to Hunter. It is false because Hunter has never engaged in any criminal conduct and Fisher had no basis whatsoever for telling the Executive Committee that Hunter had done so. Hunter Decl. ¶¶ 71-72. There is no evidence that Fisher made any investigation before making this defamatory statement. Evans Decl. ¶ 23. The factual assertion that Hunter had engaged in criminal conduct qualifies as defamation per se. *See* Cal. Civ. Proc. Code § 46(1).

Statement 2, that Fisher did not know Alexis Hunter worked for a law firm retained by the union, referred expressly to Hunter's daughter and thus, by clear implication, to him. Ratliff Decl. ¶ 15; Cummings Decl. ¶ 12. The clear import of the statement is that Hunter was concealing his alleged furtherance of his daughter's career from the Executive Committee. That accusation is directly contradicted by Hunter and other witnesses and was understood by those who heard it as an attack on Hunter's character.[21] Hunter Decl. ¶ 63; Evans Decl. ¶ 31; Ratliff Decl. ¶ 15; Cummings

[21] *See, e.g., Regalia v. Nethercutt Collection*, 172 Cal. App. 4th 361, 369 (2009) (declaring that "statements that reflect on the integrity and competence of the plaintiff, the clearest being allegations

(Footnote continued)

Decl. ¶ 12. It is reasonable to infer from these facts that Fisher purposely lied to Paul Weiss to further undermine Hunter.

Statement 3, that Hunter had tried to bribe Fisher with a watch, expressly refers to Hunter and is likewise false. Evans Decl. ¶ 32; Ratliff Decl. ¶ 16; Hunter Decl. ¶ 65. Fisher knew full well that gift-giving had been an NBPA tradition for many years, and, in fact, Fisher had distributed gifts to members of the Executive Committee. Hunter Decl. ¶ 65 & Exs. 15, 16. Moreover, Fisher *himself* had received gifts in the past from the union for his service on the Executive Committee. Ratliff Decl. ¶ 17; Hunter Decl. ¶¶ 65-66. Hunter never accepted or expected anything in return for these gifts. *Id*. There is no evidence Fisher had any basis for leveling this false accusation. Evans and Ratliff understood this statement as besmirching Hunter's character. Evans Decl. ¶ 32; Ratliff Decl. ¶ 16.

Statement 4, made by Fisher at a press conference, clearly implicated Hunter. Evans Decl. ¶ 34; Cummings Decl. ¶ 14 & Ex. 3; Hunter Decl. ¶ 71 & Ex. 18. It is false; Hunter never lied to or attempted to divide the union, and Evans, who served on the Executive Committee with Fisher, recalls no instances of such conduct. Hunter Decl. ¶ 71; Evans Decl. ¶ 34. In truth, Fisher wanted to grandstand for the assembled press and was reckless in uttering this charge. The statement impugning Hunter's integrity in conducting the affairs of the union is without question defamatory. *Regalia*, 172 Cal. App. 4th at 369.

Fisher's argument that this defamatory statement cannot be shown to have been "of and concerning" Hunter because Hunter was not mentioned specifically by name is absurd. Fisher & Wior Br. 10. Defamation law requires no such thing; rather, it is sufficient that the defamed party be referenced "either expressly or by clear implication." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1044 (1986). In deciding this question, the Court must consider the full content of the communication and the context in which the statement was made. *Franklin v. Dynamic Details, Inc.*, 116 Cal. App. 4th 375, 385 (2004); *see also Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 260-61 (1986), abrogated by statute other grounds as stated in *Kahn v. Bower*, 232 Cal. App. 3d

---

of unethical activity or incompetence," may constitute the injury to business reputation category of slander per se).

1599, 1606-07 (1991)). No one hearing Fisher's press conference would have failed to understand that he was speaking about Hunter throughout his remarks.

c. Fisher's Statements Were Not Privileged.

Fisher's assertion that Statements 2 and 3 are privileged under Cal. Civ. Proc. Code § 47(c) because they were made to Paul Weiss is flatly wrong.[22] Fisher & Wior Br. 8, 9. Fisher forfeited any common interest privilege that may have been available by disseminating the Paul Weiss report to a global audience on the Internet. *See Hawran v. Hixson*, 209 Cal. App. 4th 256, 287 (2012) (no common interest privilege where defamatory statements in press release were distributed to "the world at large via numerous Internet sources"). In any event, Fisher has not met his burden of showing that "the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest." *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90, 109 (2004). These statements were not made in the type of environment that § 47(c) is intended to protect. Fisher asserts that he had a duty to meet with the union's lawyers at Paul Weiss and answer their questions. Fisher & Wior Br. 8. But Fisher's hands are not clean. He instigated the Paul Weiss review to further his own designs and used it as a vehicle to make false accusations against Hunter. Thus, because Fisher's motives in meeting with Paul Weiss were improper and were not shared by the union's lawyers, statements made during those meetings cannot be immunized under § 47(c). Finally, as demonstrated below, Fisher's statements are not protected by the common interest privilege because they were made with actual malice. *Noel v. River Hills Wilsons, Inc.*, 113 Cal. App. 4th 1363, 1368 (2003) ("If malice is shown, the privilege is not merely overcome; it never arises in the first instance.") (internal citation omitted).

d. Hunter's Evidence Satisfies the Negligence Standard for a Private Figure and, if Necessary, the Malice Standard for a Public Figure.

(i) Hunter is not a public figure.

In defamation actions, a private figure need only prove negligence, while an all-purpose or

[22] Section 47(c) affords a conditional privilege for communications made "without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." *Mann*, 120 Cal. App. 4th at 108.

limited purpose public figure can prevail only if he proves that defendant's defamatory statements were made with actual malice. *See, e.g.*, *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (2010) (citation omitted); *see also* CACI 1701 & 1704. An all-purpose public figure is one who has achieved such pervasive fame or notoriety that he or she becomes a public figure for all purposes and contexts. *Id.* 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. *Id.*

Under no circumstances could Hunter be considered an "all-purpose" public figure. To be sure, Hunter was the Executive Director of a union consisting of high-profile and highly paid professional basketball players, but Hunter himself was not a star attraction. While Hunter drew public attention when the union and the NBA engaged in collective bargaining negotiations, he had not achieved a "pervasive fame or notoriety." Nor can Hunter be characterized as a limited purpose public figure in this case because there is no evidence of a public controversy around Hunter's job performance until *after* Fisher launched his smear campaign. *Copp*, 45 Cal. App. 4th at 845 ("To characterize a plaintiff as a limited purpose public figure, the courts must first find that there was a public controversy."). The Court would also have to find that Hunter "undertook 'some voluntary act through which he [sought] to influence the resolution of the public issues involved.'" *Id*. Here, Hunter only defended himself publicly after he was defamed by Fisher. *Cf. Gilbert v. Sykes*, 147 Cal. App. 4th 13 (2007) (most cases involving limited purpose public figures "have typically involved persons who claimed they were defamed for private conduct *after* they injected themselves into matters of general public discussion or controversy") (emphasis in original).

(ii) Fisher made the defamatory statements with actual malice.

Nonetheless, Hunter has made a prima facie showing that Fisher acted with actual malice. "[A]ctual malice means that the defamatory statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *New York Times*, 376 U.S. at 280. Fisher knew that his statements were false when he made them, or was reckless in not knowing. At the same time, he manifested overt hostility toward Hunter. Evans Decl. ¶ 24 (Fisher was "distant and cold" toward Hunter); Ratliff Decl. ¶ 12 (Fisher "hostile towards" Hunter). These facts make out a

prima facie showing of actual malice. *See, e.g.*, *Fletcher v. San Jose Mercury News*, 216 Cal. App. 3d 172, 186 (1989) (defendant's ill will or hostility toward plaintiff, if linked to the defendant's awareness of probable falsity, can be circumstantial evidence of constitutional malice); *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 868 (2009) (anger and hostility toward plaintiff supports inference of actual malice).

e. Fisher's Statements Injured Hunter.

Hunter suffered financial, personal, and reputational harm as a result of Fisher's defamatory statements. Hunter Decl. ¶ 86.

D. Hunter's Tortious Interference and Fraud Claims Are Not Barred by the Anti-SLAPP Statute.

1. The Tortious Interference and Fraud Claims Do Not Arise From Protected Activity.

Hunter's fifth through eighth claims arise from Fisher's and Wior's interference with Hunter's Employment Contract and 2010 Extension. Compl. ¶¶ 134, 141, 149, 160. The ninth and eleventh claims arise out of Fisher's secret CBA negotiations. *Id*. ¶¶ 165, 182. Defendants argue that Hunter "centers [these] counts on Fisher and Wior's use of the media," which defendants claim "puts those claims squarely under the anti-SLAPP statute." Fisher & Wior Br. 10. Defendants' proposition that their covert campaign to displace Hunter as Executive Director, and their attempts to conceal those efforts, constitute conduct in furtherance of the constitutional right to free speech or the right to petition contorts the anti-SLAPP statute beyond recognition. The anti-SLAPP statute also was not meant to protect Fisher's so-called "right" to secretly negotiate with the NBA owners in violation of the By-Laws. Defendants' activities were not conducted "in connection with a 'public issue' or an 'issue of public interest'" and so are not protected. *Commonwealth Energy*, 110 Cal. App. 4th at 32.[23]

2. The Tortious Interference Claims Are Well Supported by Evidence.

"To prevail on a cause of action for intentional interference with contractual relations, a

[23] Defendants' "use of the media" alone cannot satisfy the public interest requirement because defendants did not contribute to the public discussion of an ongoing public controversy; instead, defendants tortiously created the public controversy in the first place. *See supra* pp. 20-22.

plaintiff must plead and prove (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1148 (2004). The claim for negligent interference with prospective economic relations is similar except that it arises from defendant's negligent conduct. *See* CACI 2204 & 401. As shown above, Hunter has made a prima facie showing on the first and fourth of these elements. *See supra* pp. 12-18.[24]

The second (defendant's knowledge), third (intentional or negligent conduct), and fifth (damage) elements are established as well. Fisher knew about the 2010 Extension because he signed it. Hunter Decl. ¶ 6. Wior's knowledge of the 2010 Extension can be inferred from her work during the 2011 CBA negotiations, her presence at NBPA meetings, and her knowledge of the termination of Hunter's contract. *Id.* at ¶¶ 47, 49-51, 53, 69; *see also* Cummings Decl. ¶¶ 5-6. The evidence discussed at length above is also sufficient to make a prima facie showing that Fisher and Wior intentionally or, at a minimum, negligently disrupted Hunter's contractual relationship with the union by undermining his authority and falsely discrediting him with the union and in the media. *See supra* pp. 4-6. The inferences that can be drawn from the changes in Fisher's demeanor, the owners' deference to Fisher during the negotiation sessions, and the call from Kobe Bryant on the eve of a crucial negotiating session are collectively sufficient to make a prima facie showing that Fisher engaged in secret negotiations with the NBA and team owners. *See supra* pp. 4-5.

Fisher's and Wior's intentional conduct is further illustrated by their actions after Hunter confronted Fisher about the secret negotiations and after the 2011 CBA was signed. Fisher absented himself from the Executive Committee, seeking counsel solely from Wior, only to reemerge months later with reckless accusations of criminal conduct against Hunter and a plan to launch an investigation without Executive Committee approval, all resulting in the Executive Committee's demand that he resign. Evans Decl. ¶ 22 & Ex. 1; Hunter Decl. ¶ 59. Fisher refused to resign, which

[24] Wior is a stranger to the contract between Hunter and the NBPA because she had no formal role at the union. Hunter Decl. ¶ 47. Fisher can be held liable for inducing the breach of or interfering with the Employment Contract and 2010 Extension because Fisher was acting to advance his *own* interests in inducing that breach. Pl. Dem. Opp. at 12-13.

further evidences his determination to oust Hunter from the NBPA. Evans Decl. ¶ 22; Hunter Decl. ¶ 59. Given the extent to which Fisher worked with and apparently relied on Wior, a reasonable inference can be drawn that Wior was aware of and involved in Fisher's secret negotiations with the NBA and team owners. Fisher's conduct during the investigation conducted by the union's lawyers at Paul Weiss is further evidence that he acted intentionally to interfere with Hunter's Employment Contract, as extended. Hunter Decl. ¶¶ 63-65.

Such evidence, as well as observations of Fisher's and Wior's demeanor, gives rise to a reasonable inference that Fisher and Wior acted intentionally or negligently in order to induce a breach of or interfere with Hunter's contractual relations. *See, e.g.*, *People v. Blacksher*, 52 Cal. 4th 769, 808 (2011) ("Generally, a lay witness may not give an opinion about another's state of mind, *but a witness may testify about objective behavior and describe behavior as being consistent with a state of mind*.") (emphasis added; internal quotations and citations omitted).[25]

3. The Fraud Claims Are Also Supported by Sufficient Evidence.

The facts discussed above establish a probability of success on the merits of the fraud claims. *See* CACI 1900 & 1901. While purporting to be part of the union's unified CBA negotiating team, Fisher engaged in undisclosed secret negotiations with the NBA and owners, later falsely represented that he had not engaged in secret negotiations, knew the representations were false, and intended for Hunter to rely on them. *See supra* pp. 4-5. Hunter relied on Fisher's misrepresentations to his detriment by not accounting for Fisher's deception when he continued to negotiate the CBA. Hunter Decl. ¶ 39. The resulting CBA deal undermined Hunter's support among the players and led to economic loss. *Id*. ¶¶ 44, 84. In addition, Fisher's conduct is actionable as concealment, because Hunter and Fisher shared a relationship as the Executive Director and President of the NBPA, respectively, and as counterparties on Hunter's 2010 Extension. Hunter Decl. ¶ 32 & Ex. 4; *cf.* Pl. Dem. Opp. at 18.

[25] Because Fisher made defamatory statements about Hunter and Wior improperly interfered in union affairs and orchestrated a smear campaign, their conduct was also "wrongful" as required by the claim of interference with prospective economic relations. CACI 2202; Pl. Dem. Opp. at 15.

4. Fisher's and Wior's Conduct Harmed Hunter.

Fisher's and Wior's conduct caused the breach and disruption of Hunter's contractual relationship with the NBPA. By engaging in secret negotiations with the NBA owners and thereby interfering with Hunter's sole and exclusive role under the By-Laws, Fisher, with Wior's support, undermined Hunter's negotiating strategy and his support among the players and the Executive Committee. Hunter Decl. ¶ 44; *see* Evans Decl. ¶ 15; Cummings Decl. ¶ 8. Fisher and Wior then followed up by planting stories in the press accusing Hunter of dishonesty. Hunter Decl. ¶ 59. And by instigating the Paul Weiss review and providing false information to the investigators, Fisher played a precipitating role in Hunter's termination, which was based, in large part, on the findings set forth in the Paul Weiss report. Hunter Decl. ¶¶ 68-69; Evans Decl. ¶¶ 27, 31-32. Lastly, Fisher's and Wior's intentional sabotage of Hunter's contractual relationship with the NBPA resulted in great economic harm to Hunter. *See supra* pp. 6-7.

E. If the Court Finds Hunter's Prima Facie Showing Deficient in Any Particular Respect, the Court Should Order Discovery for Good Cause Shown.

Although Hunter respectfully submits that the Court should deny the motions based on the foregoing showing, should the Court have any doubts about the sufficiency of the evidence, Hunter respectfully requests that the Court grant Plaintiff's Motion to Allow Plaintiff to Conduct Discovery, filed August 5, 2013, pursuant to CCP § 425.16(g).

IV. CONCLUSION

For the foregoing reasons, defendants' motions to strike should be denied.

DATED: November 21, 2013

Respectfully submitted,

SIDLEY AUSTIN LLP

David L Anderson

DAVID L. ANDERSON
MARIE L. FIALA
JOSHUA HILL
Attorneys for Plaintiff
G. WILLIAM HUNTER